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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1931~~ 1932

No. ~~707~~ 5

THE NEW YORK CENTRAL SECURITIES CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED FEBRUARY 16, 1932

(36,521)

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[fol. 1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity. 50133

NEW YORK CENTRAL SECURITIES CORPORATION, Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, New York Central Railroad Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and The Michigan Central Railroad, Defendants

PRÆCIPE FOR TRANSCRIPT OF RECORD

The Clerk will please prepare and certify the following enumerated papers as the record herein, for transmission to the Supreme Court of the United States on the appeal herein. This præcipe shall not cover the parts of the said record to be printed by the Clerk of the United States Supreme Court:

(1) Petition;

(2) Answer of the United States;

(3) Answer of Interstate Commerce Commission;

[fol. 3] (4) Joint and several answer of defendant Railroad Companies;

(5) Motion for leave to interpose Supplemental Petition;

(6) Application filed with, and by reference made a part of proposed Supplemental Petition;

(7) Order, granting motion to interpose;

(8) Answer of Interstate Commerce Commission to Supplemental Petition;

(9) Answer of United States to Supplemental Petition;

(10) Joint answer of defendant Railroad Companies to Supplemental Petition;

(11) Motion of United States to dismiss petition;

(12) Motion of Interstate Commerce Commission to dismiss petition;

(13) On the final hearing in the above entitled case, before the Statutory Court, composed of Judges Mack, Cox and Woolsey, the plaintiff offered in evidence a certi-

fied copy of the record before the Interstate Commerce Commission in the matter of the New York Central Unification (Exhibit 1); a certified copy of the record of the Interstate Commerce Commission in the matter of the application of the New York Central Railroad Company to assume obligation and liability (Exhibit 2); page 4 of annual report of Cleveland, Cincinnati, Chicago & St. Louis Railway Company 1929 (Exhibit 3), the same being received by the Court, without passing on its admissibility, and objection of defendants being reserved; page 4 of the annual report of the Michigan Central Railroad Company, for the year 1929, (Exhibit 4), the same being received, without passing upon its admissibility, and objection of defendants being reserved; page 4 of the annual report of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, for the year 1926, (Exhibit 5), the same being received, without passing on its admissibility, and the objection of defendants being reserved; page 4 of the annual report of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, for the year 1927, (Exhibit 6), the same being received, [fol. 4] without passing on its admissibility, and objection of defendants being reserved; page 4 of the annual report of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, for the year 1928 (Exhibit 7), the same being received, without passing on its admissibility, and objection of defendants being reserved. Said Exhibits 1 to 7, inclusive, shall be made part of the record herein.

Plaintiff offered in evidence a certified copy of the report and order of the Interstate Commerce Commission, the order being entered March 17th, 1930, Finance Docket 8081, relative to the Owasco River Railroad, et al., which was objected to by counsel for defendant Railroad Companies. However, without waiving the said objection, but in order to save time, the said counsel for said defendant Railroad Companies made the following statement, which was received as evidence, subject to the said objection:

"The Interstate Commerce Commission in the orders that are under review before your Honors now, prescribed the condition to its authorization of the leases that we were then applying for, that the New York Central Railroad Company should offer to acquire, at the commercial value thereof, to be determined by agreement of the parties, or

failing agreement by arbitration, and then approved by the Commission, certain specified so-called short lines. Those included the Ulster & Delaware Railroad Company, the Owasco River Railroad, the Fonda, Johnstown & Gloversville Railroad, the Boyne City, Gaylord & Alpena Railroad, the Chicago, Attica & Southern Railroad, and the Federal Valley Railroad.

"In the case of the Owasco River Railroad, the parties were able to come to an agreement. That is to say, there was an agreement as to the commercial value of the property.

"Subsequent to the reaching of that agreement, we applied to the Commission, as the law provides, for authority to acquire the shares of stock of the Owasco River Railroad Company. That proceeding culminated, after a hearing, in an order of the Commission authorizing us to acquire those shares of stock of the Owasco River Railroad at the price stated. And that is an accomplished fact.

"In the case of the Federal Valley Railroad initially the parties were unable to agree on the price. The matter proceeded somewhat in arbitration, and finally the parties did [fol. 5] agree upon a price, and there also we acquired, pursuant to a subsequent order of the Commission, the shares of stock of that Company.

"In the case of the Ulster & Delaware, the Boyne City, Gaylord & Alpena, and the Chicago, Attica & Southern, the proceedings are not yet concluded. We have had arbitration proceedings in each of those instances for the determination of the commercial value of the railroad. We have the awards of the arbitrators, and the matters in various stages are before the Interstate Commerce Commission for subsequent disposition.

"In the case of the Fonda, Johnstown & Gloversville Railroad, that railroad company withdrew its application, and the Commission has entered an order modifying the condition with respect to that line."

It was stipulated by and between counsel, at the said trial and hearing that petitioner herein, New York Central Securities Corporation, and Clarence H. Venner, an officer of the said Corporation and one of the parties referred to in the petition, were, as of the date of the accrual of the rights herein and at the time of the hearing, holders of

shares of stock of the New York Central Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the Michigan Central Railroad.

Thereupon petitioner and defendants rested and the case was argued on behalf of all parties, the Court reserving its decision, both upon defendants' motion to dismiss and upon the merits.

(14) Opinion of the Court;

(15) Findings of Fact and Conclusions of Law;

(16) Decree, denying motion for injunction and dismissing petition on the merits, with costs;

(17) Notice of Motion and petition of plaintiff for re-hearing;

(18) Memorandum order, denying plaintiff's petition for re-hearing;

(19) Petition for allowance of appeal and Assignment of Errors;

(20) Order, allowing appeal, and appeal bond filed;

[fol. 6] (21) Stipulation and order, extending time to file record to October 15th, 1931;

(22) Citation on appeal and acknowledgment of service thereon;

(23) Stipulation and order, extending time to file record on appeal to November 16th, 1931;

(24) Stipulation and order, extending time to file record on appeal to February 16th, 1932;

(25) Notice of appeal to Attorneys General of New York, Pennsylvania, Ohio, Indiana, Illinois and Michigan, and acknowledgments of service by the same.

(26) This præcipe.

Dated January 30, 1932.

House, Grossman & Vorhaus, by Joseph Fischer, Attorneys for Plaintiff.

Approved.

Daniel W. Knowlton, Attorney for Defendant Interstate Commerce Commission. Elmer B. Collins, Special Assistant to the Attorney General, Attorney for Defendant United States of America. Jacob Aronson, Attorney for Defendants New York Central Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and the Michigan Central Railroad.

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AS TO PRÆCIPE—Filed Feb. 2, 1932

It appearing to the Court that plaintiff-appellee's præcipe designating the record herein for transmission to the Supreme Court of the United States has been duly filed and approved by the parties herein, it is this 1 day of February, 1932,

Ordered that in preparing, certifying and transmitting the transcript of the said record to the Supreme Court of the United States the Clerk is permitted to proceed in accordance with the said præcipe.

Julian W. Mock, Judge United States Circuit Court, Southern District of New York.

[File endorsement omitted.]

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF PETITION

SIRS: Please take notice that petitioner above named has this day duly filed with the Clerk of the District Court of the United States, for the Southern District of New York, a petition, a true copy of which is hereto annexed.

Dated New York, August 21st, 1929.

Yours, etc., House, Grossman & Vorhaus, Attorneys for Petitioner. Office & P. O. address: 521 Fifth Avenue, Borough of Manhattan, New York City.

To the Attorney General of the United States, the Interstate Commerce Commission, the New York Central Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Michigan Central Railroad Company.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION—Filed Aug. 21, 1929

To the Honorable the District Court of the United States in and for the Southern District of New York, sitting as a court of equity:

New York Central Securities Corporation, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and a citizen and resident of the State of Delaware and having its principal office in the city of Dover in said State and its principal operating office in the State, County and City of New York, and within the Southern District of New York, brings this its Petition against the United States of America, the Interstate Commerce Commission, The New York Central Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, and a citizen and resident of each of said States, and being also the petitioner before the Interstate Commerce Commission [fol. 10] upon whose petition the order herein complained of was made, and having its residence in the State, County and City of New York and within the said Judicial District, and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, a corporation duly organized and existing under and by virtue of the laws of the States of Ohio and Indiana and being a citizen and resident of each of said States, and The Michigan Central Railroad Company, a corporation duly organized and existing under *the* by virtue of the laws of the State of Michigan and being a citizen and resident of said State; and thereupon complains and respectfully represents, alleges and shows unto this Honorable Court as follows:

1. Petitioner, The New York Central Securities Corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware; is a citizen and resident of said State; has its principal office in the City of Dover, State of Delaware, and its principal operating office in the City, County and State of New York,

and is and at all times herein mentioned has been the owner of shares of the capital stock of each of the Railroad Companies parties to this suit, the amounts of which holdings are hereinafter set out.

2. Defendant, The United States of America, is sued as such under and pursuant to the provisions in that behalf of Section 46 of Chapter 2, Title 28, United States Code, being Section 208 of the Judicial Code; and this is a suit to enjoin, set aside, annul or suspend an order of the defendant, The Interstate Commerce Commission, hereinafter sometimes called or referred to as the Commission.

[fol. 11] 3. Defendant, The New York Central Railroad Company, (hereinafter sometimes called or referred to as the Central, The New York Central, or the New York Central Company), is a consolidated railroad corporation organized and existing under and by virtue of the laws of New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois, is a citizen and resident of each of said States; owns and operates a railroad therein which extends from the City of New York, in the State of New York, to the City of Chicago, with numerous branch lines; is the party or one of the parties upon whose petition the order herein complained of was made by the Interstate Commerce Commission; and has its residence in the City, County and State of New York.

4. Defendant, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (hereinafter sometimes called or referred to as the Big Four), is a consolidated railroad corporation organized and existing under and by virtue of the laws of the States of Ohio and Indiana; is a citizen and resident of each of said States; and owns and operates a railroad therein and in the States of Illinois and Michigan with trackage rights in Kentucky and Missouri, which extends from Cleveland, Ohio, to St. Louis, Missouri, together with other terminal points and with numerous branch and leased lines.

5. The Michigan Central Railroad Company (hereinafter sometimes called or referred to as the Michigan Company), is a railroad corporation organized and existing under and by virtue of the laws of the State of Michigan;

is a citizen and resident of that State; and operates a railroad therein and in the States of Ohio, Indiana and Illinois and in the Dominion of Canada, consisting of lines owned and leased, together with trackage rights, which railroad extends from Buffalo, New York, to Chicago, Illinois, with [fol. 12] other terminal points and with numerous branch lines.

6. The order of the Interstate Commerce Commission concerning which this suit is brought, was made upon the petition, complaint or application of the defendant The New York Central Company, for authority to acquire control, under leases executed and delivered or to be delivered in the City, County and State of New York, of the railroad systems, inter alia, of the said Big Four and Michigan Central companies, which matter so complained of by petition before the Commission arises in the Southern District of New York, wherein this suit is brought under and pursuant to Section 43 of Title 28 of the United States Code.

7. On the 29th day of July, 1926, there was filed with the Commission and recorded in its Finance Docket No. 5690, the "Application of The New York Central Railroad Company for authority to acquire control, under lease, of the railroad systems of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Michigan Central Railroad Company and Chicago, Kalamazoo and Saginaw Railway Company, a copy of which application is filed herewith and by reference made a part hereof; and concurrently therewith there was also filed with the Commission and recorded in its Finance Docket No. 5688, the application, a copy of which is also filed herewith, and by reference made a part hereof, of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company to acquire control under lease of the railroads and property of the Cincinnati Northern [fol. 13] Railroad Company and of the Evansville, Indianapolis and Terre Haute Railway Company, all of which proposed leases have already been executed for the term of ninety-nine years, renewable forever, from their effective date, for delivery under the authorization and approval of the Commission; both of which applications were made under favor of paragraph (2) of Section 5 of the Interstate Commerce Act, Chapter 1, Title 49, United States Code,

and were tried and decided together in a consolidated proceeding.

8. The said applications disclose and petitioner here now alleges that the railroads and properties of The Cincinnati Northern Railroad Company and of the Evansville, Indianapolis and Terre Haute Railway Company, now are controlled through stock ownership by, and will (subject to the Commission's authorization in said proceeding) be leased to, the Big Four; thereupon such proposed leaseholds will be transferred to the New York Central, so that upon the consummation of all the leases and transfers contemplated by said proceedings, including the said proposed direct leases of the Big Four and Michigan Central to the New York Central, the latter will own in fee or under permanent lease and will operate as one railroad system many parallel and hitherto competing lines, including the three separate rail routes of the New York Central, Big Four and Michigan Central between Toledo, Ohio, and Chicago, Illinois; the two distinct trunk lines of the New York Central and Michigan Central between Buffalo, New York, and Chicago, Illinois, with duplicate interconnections of both lines at and between Detroit, Michigan, and Toledo, Ohio; and the two rail routes of the New York Central and Big Four between Cleveland, Ohio, and Chicago, Illinois; with many other and intermediate intersections and interconnections [fol. 14] of competing lines of the parties to said proposed leases, whereby competition heretofore existing between and among them will in consequence of the New York Central's proposed unified ownership and operation of all of them be crushed and destroyed.

9. To the said application of The New York Central Railroad Company, Finance Docket 5690, petitioner, upon leave granted, filed with the Commission on or about the 12th day of November, 1926, the "intervening petition of New York Central Securities Corporation" praying that the Central's application be denied, the applicant's petition dismissed, and that the said proposed leases be found to be against the public interest, contrary to law, oppressive to minority stockholders of the Big Four and Michigan Central, and violative of the rights of said intervener, etc.

10. Petitioner alleged in said intervening petition before the Commission and it here now alleges that it is the owner

and holder of fifty-five shares of the capital stock of said applicant, one hundred shares each of the preferred and of the common capital stock of said Big Four, and sixteen shares of the capital stock of said Michigan Central, and that it has been a stockholder in each of said companies continuously for many years past and from a time long prior to any action taken by the officers, directors or stockholders of any of the railroad companies, parties to said proposed leases, for the entering into the leases aforesaid, and that it acts herein for itself, and also in behalf of other minority stockholders of said carrier corporations, including Clarence H. Venner, and C. H. Venner & Company, (of which he is the sole member), owners and holders of 491 shares of the capital stock of said applicant, which stand on said applicant's books in one or the other of said names, and 170 shares of the capital stock of said Michigan Central, [fol. 15] which stand on its books in the name of said C. H. Venner & Company; General Investment Company, a corporation duly organized and existing under the laws of the State of Maine, and the owner and holder of 496 shares of the capital stock of said applicant; and Continental Securities Company, a corporation duly organized and existing under the laws of the State of New Jersey, and the owner and holder of 110 shares of applicant's and 100 shares of said Michigan Central's capital stocks; all of which shares were acquired by them respectively, prior to any action taken by the officers, directors or stockholders of the railroad companies, parties to said proposed leases, for the entering into the leases aforesaid; and petitioner and other minority stockholders aforesaid have protested to each of said railroad companies against so entering into said leases, and have sought by such means as were available within said corporations to prevent the same.

11. Petitioner further alleged before the Commission and now here alleges that the terms, covenants and provisions of said proposed leases of said Big Four, said Michigan Central and said Chicago, Kalamazoo and Saginaw Railway Company to said applicant, The New York Central Railroad Company, and the present and proposed relations of said carriers among themselves are such as to constitute the control of the three former by the latter, under such leases and otherwise, involving the consolidation of such

carriers into a single system for ownership and operation, within the meaning and prohibition of Section 5, paragraph 2 of the Interstate Commerce Act, as amended August 24, 1912, and February 28, 1920, by 24 Stat. L. 379, and 41 Stat. L. 480; specifications whereof are as follows:

[fol. 16] (a) Said applicant, The New York Central Railroad Company, now owns 84.694% or more of the preferred stock and 91.308% or more of the common stock of said Big Four now outstanding; 99.145% or more of the capital stock of the Michigan Central now outstanding, and 40% of said Chicago, Kalamazoo and Saginaw Railway Company—the remaining 60% of the latter's stock being owned by said Michigan Central; all of which railroads and systems are now operated as the "New York Central Lines", and under said proposed leases will be operated together as one company. Said proposed leases by Article III of the Big Four and Michigan Central indentures contemplate and provide for the acquisition by such lessee of all the offered minority shares of the capital stocks of such lessors at prices to be fixed as in said proposed leases provided. Under such proposed leases, applicant's control of and proprietary dominion over such leased properties are such as to accomplish and involve the consolidation of such carriers, as aforesaid, into a single system for ownership and operation.

(b) Said proposed leases are for the term and period of ninety-nine years each, and the reversions of the demised properties are in substance and effect held and owned by said applicant, thereby involving, as aforesaid, the consolidation of such carriers into a single system for ownership and operation.

(c) All of said railways and systems are now being operated under the common control of said applicant, under the common designation "The New York Central Lines", with substantially identical or closely interlocking boards of directors and common executive and administrative officers; and said leases contemplate complete unification of administration and operation and ultimate absolute ownership of all said railways and systems by said applicant, exclusively, and in and under its own name; thereby involving, as aforesaid, the consolidation of such carriers into a single system for ownership and operation.

[fol. 17] (d) Said proposed leases, by Section 3 of the article in each indenture entitled "Covenants of the Lessor", authorizes the abandonment, retirement, sale or other disposal by lessee, at its discretion, of any of the lessors' lines of railway and of their material, equipment, or other tangible personal property; and by Section 2 of the same article, the alteration or extension of such lines and the addition thereto of other lines by such lessee are expressly permitted, thereby allowing and intending the several railway properties of such lessors and lessee to be moulded into complete physical union under lessee's domination, and thereby accomplishing and involving, as aforesaid, the consolidation of such carriers into a single system for ownership and operation.

(e) Said railways and systems and various component parts thereof are parallel and naturally competing lines, as more fully appears from the descriptions of the same in said application contained and from the "key map" of said combined properties appended thereto. By competition of said lines of railway among themselves, and particularly by such competition between the lines connecting the eastern and western gateways at Chicago and Buffalo, their separate currents of commerce are distinctly segregated and their respective transportation facilities and services are, by mutual emulation and rivalry, made more useful and beneficial to the public. On the other hand, said proposed leases will, by integration, eliminate such separate and naturally competitive streams of commerce and carrier service, and the public benefits therefrom and will, by such unification, accomplish and involve, as aforesaid, the consolidation of such carriers into a single system for ownership and operation.

[fol. 18] (f) The combination of some or all of the above recited specifications, together with other circumstances, disclosed by the record herein, constitutes and involves the consolidation of said carriers into a single system for ownership and operation.

12. Petitioner further alleged before the Commission and here alleges that the control by applicant of said other carriers, either under said proposed leases, purchases of stock or in other manner aforesaid, will not be in the public in-

terest, in view of the dominant control which the said applicant would be able to exercise over the lessor companies, their properties, the territories and communities by them specially served and the discrimination which it would be able to exercise in the betterment and development of said applicant's own properties, which domination and discrimination would operate unequally and unnaturally to the detriment of the leased properties and the areas and populations dependent upon them. Such control will not be in the public interest; furthermore, in view of the obligations assumed by and privileges accorded to said applicant, as lessee under said proposed leases, as set forth in the forms of indenture appended to said application, which are by reference made a part hereof.

13. Petitioner further alleged before the Commission and now here alleges that the said control by applicant of said other carriers, under the said proposed leases, purchases of stock and in other manner aforesaid, involves a consolidation within the meaning of paragraph (6) of the same section of said act. But the properties so to be consolidated, as aforesaid, are not properties theretofore in separate ownership, management and operation, within the meaning and requirement of said paragraph (6); but, on the contrary, are under common ownership, management and operation, and for years past have been approaching and [fol. 19] uniting more and more closely together.

14. Petitioner further alleged before the Commission and now here alleges that no complete plan for the consolidation of the railway properties of the continental United States into a limited number of systems, has yet been adopted by the Commission, nor is the formulation or adoption of such complete plan in prospect in consonance with the said application, and there is, meanwhile, no ground for anticipating that the application for or order granting the Commission's authorization of said proposed leases involving a voluntary consolidation, as aforesaid, is in harmony with and in furtherance of such complete plan of consolidation mentioned in paragraph (5) of the same section of said act, and such consolidation is, in fact, not in harmony therewith.

15. Petitioner further alleged before the Commission and now here alleges that the tentative plan for the con-

solidation of the railway properties of the continental United States into a limited number of systems which has heretofore been prepared and adopted by the Commission, is still the subject of the publicity and hearings provided for by paragraph (5) of the same section of said act and no time has been fixed by the Commission for bringing them to a close, nor has any complete plan been formulated for adoption by the Commission after such hearings are at an end, or for determining when or how any proposed voluntary consolidation shall be harmonized with such plan, except that in the division of such railways into such systems under such plan, competition shall be preserved as fully as possible, and, wherever practicable, the existing routes and channels of trade and commerce shall be maintained, as provided by paragraph (4) of the same section of said act. The control by applicant of said other carriers under said proposed leases by the said purchases of stock and in other manner aforesaid, and the consolida- [fol. 20] tion of such carriers into a single system for ownership and operation which is thereby involved, will not preserve competition as fully as possible, but, on the contrary, will entail complete suppression of competition and upon a scale unprecedentedly vast in view of the volume of traffic over the railroads that are parties to the proposed lease. Such control and the consolidation therewith involved do not preserve and maintain, wherever practicable, the existing routes and channels of trade and commerce, but, on the contrary, under the provisions of said proposed leases, contemplate, permit and afford incentives to diversions of and discriminations against the existing routes and channels of trade and commerce.

16. Petitioner further alleged before the Commission and now here alleges that the terms of the proposed leases are peculiarly oppressive to the lessors' minority stockholders, and the returns to the stockholders of the lessor companies, as provided in said proposed leases, I, are wholly disproportionate to the valuations of their respective properties and to their demonstrated earning powers, respectively. The proposed leases, furthermore; II, make no provision for the exclusion from the demise of cash and other liquid assets which are not properly susceptible of being leased, but, on the contrary, provide for what is sub-

stantially a loan of such cash and assets, sequestering the same to the use of the lessee, with no provision for the payment of interest upon such loan, instead of providing for the retention of such cash and assets by the lessors for division thereof among their stockholders. III. Said proposed lease of the Michigan Central provides for a dividend to the minority stockholders of said company of $50 per share per annum throughout the period of the lease, which rate of dividend is a grossly inadequate return on the valuation of said Railroad or its capital stock, a deprivation forced upon said minority stockholders and a corre-
[fol. 21] sponding unfair and unlawful advantage exacted by the majority stockholder, the applicant herein, in violation of the trust relationship occupied by the latter towards the former. In the proceedings for the valuation of said Michigan Central pending before the Commission, and numbered 564 on its valuation docket, certain tentative values as of June 30, 1918, were fixed in 1925, for its property used in transportation. On or about August 25, 1925, said Michigan Central filed its protest against said tentative valuation, and on page 266 thereof, claimed the cost of reproducing its properties used in transportation as of said valuation date to be $399,334,283, and the true value of such properties as of said date is at least said amount. Said value, adjusted as of April 30, 1926, is augmented by the investment of $72,579,662 meanwhile made by said Michigan Central in addition to its property and investments in leased lines and affiliated companies, according to figures taken from its official reports, except that for the last six months of 1928 one-half of the total for that year is assumed to be correct. Said value is further augmented as of April 30, 1926, by $23,260,669 excess of current assets over current liabilities on said date; and should, on the other hand, be diminished by said Michigan Central's mortgage and equipment indebtedness amounting to $76,267,012 as of said date. As so adjusted the value of the stockholders' equity applicable to the capital stock of $18,736,400 on said date, amounts to $418,917,602, which is equivalent to $2,235.85 per share of $100 par value, and the fair value per share of said stock is not less than said amount at the present time. The said annual dividend provided for by said lease is thus less than 2¼% on such fair value.

17. Petitioner further alleged before the Commission and now here alleges that such fixed annual dividend of [fol. 22] 50% provided for by said proposed lease of the Michigan Central, is grossly inadequate in proportion to its earnings in recent years, which, for 1925 and 1926, are upwards of 100% per annum, and for some years prior thereto were upwards of 50% per annum, and there is a strong probability that such earnings will be progressively increased henceforward as they have been hitherto, but the said proposed dividend is rigid and inflexible, as well as inadequate, as aforesaid. The dividends hitherto on said Michigan Central stock have been for the past eight years as follows: in 1921 such dividends was 6%; in 1922, 14%; in 1923, 20%; in 1924, the same; in 1925, 27½%; in 1926, 35%; in 1927, 40%; in 1928, 40%. In addition to this, said Michigan Central has carried to surplus a vast amount of undistributed earnings, so that its surplus on January 1, 1915, was $12,361,195, and on April 30, 1926, it was $82,779,597 or nearly five times its entire capital stock of $18,736,400. The yearly rental provided for by said proposed lease and to be paid out as dividends, is, for the said Michigan Central's total capital stock, about 11¼% per annum on its accumulated surplus alone, independent of net earnings from operations; and in view of said surplus and of the demonstrated earning power of said Michigan Central, such proposed rate of dividend is hardly half of what past experience justified, and a still smaller proportion of what a reasonable forecast of the future earning power promises. Petitioner further alleges that on December 31, 1928 the corporate surplus exceeded $100,000,000 and that from January 1, 1923, to December 31, 1928 the net earnings per share of said Michigan Central available for dividends and the amount of dividends paid in each year out of said net earnings have been as follows:

[fol. 23]

Year	Earnings per share	Dividends paid per share
1923	$75.66	$20.00
1924	72.73	20.00
1925	100.37	27.50
1926	101.21	35.00
1927	90.02	40.00
1928	103.49	40.00

18. Petitioner further alleged before the Commission and now here alleges that said proposed Big Four lease provides for a fixed rental dividend of $5.00 per share per annum upon its preferred stock and $10.00 per share per annum upon its common stock; but that, during the five years ending with the year 1926, said Big Four has earnings upon its common capital stock on an average of $15.00 per share per year over and above the average rate of $5.00 per share paid out in dividends, which excess was passed to surplus account. In 1927 the Big Four's net earnings were $17.49 per share of common stock, the dividend 7¾%, and in 1928 they were about $17.70 and 8%. Said proposed rental dividend rate for the minority common stock of the Big Four is only less than half of the current earnings apportionable thereto, and such fixed rental dividend rates is inadequate and unfair to the minority stockholders of said Big Four in about the same proportion that the corresponding rental dividend rate in the proposed Michigan Central lease is to the latter's stockholders.

19. Petitioner further alleged before the Commission and now here alleges that none of the proposed lessor companies has applied to the Commission for the authorization of the leases by them of their respective properties, and without such applications an order by the Commission authorizing said New York Central to become lessee of said properties is insufficient and unavailing under the provisions of said Interstate Commerce Act.

[fol. 24] 20. Petitioner further alleged before the Commission and now here alleges that said proposed leases are unlawful as constituting a combination or combinations in restraint of trade in violation of the federal antitrust laws, as designated in Section 1 of the Act of October 15, 1914, 38 Stat. L. 730, and the Commission is without power under paragraph (8) of Section 5 of the Interstate Commerce Act, aforesaid, to suspend the operation of said antitrust laws by any delegation by Congress of legislative power to the Commission in derogation of the provisions of the Constitution of the United States vesting the legislative power in Congress only; and such paragraph (8) is, in that respect, unconstitutional and void as purporting to empower the

Commission to suspend, and to make discriminations in the application and operation of, said antitrust laws and the pains and penalties imposed for criminal or other violations thereof.

21. Petitioner further alleged before the Commission and now here alleges that said proposed leases are not in the public interest, nor will such public interest be promoted thereby, in that a combination in restraint of trade will result from the authorization thereof by this Commission and such proposed leases will be detrimental to said minority stockholders, to said lessor companies, and each of them, to that portion of the public directly participating in the actual or potential passenger and freight traffic on said lessor companies' lines and to the population of the areas traversed by or dependent wholly or in part upon their service, and which the parties to said leases are severally fitted to serve, and to develop by such service.

22. Petitioner further alleged before the Commission and now here alleges that said proposed leases are unlawful and [fol. 25] prejudicial to the public interest in that they are amenable to annulment for violations of contracts, oppressiveness to minority stockholders and for non-observance of the limitations imposed by the Transportation Act and other laws of Congress and by the Federal Constitution, and there are other reasons apparent upon the face of the record which required the Commission, in the exercise of its lawful jurisdiction and visitorial powers, to refuse to entertain or to grant the said application, and petitioner denies that said The New York Central Railroad Company has been or is now equitably apportioning or will henceforth equitably apportion the service and traffic of the so-called New York Central Lines among the railways and systems of the said lessor and lessee companies, as set forth in paragraph (j)-2 of its said application before the Commission, but it alleges that, on the contrary, said Central Company has apportioned and will apportion the same oppressively and destructively to the interests of said controlled companies and the interests of their minority stockholders, and that such apportionment, relationship and control has been, is and will be without advantage in the public interest.

23. Petitioner further alleged before the Commission and now here alleges that a certain indenture made and dated

April 13, 1898, styled "Three and one-half per cent Indenture, Michigan Central Collateral—$21,550,000.00", was entered into between The New York Central & Hudson River Railroad Company with Guaranty Trust Company of New York; that said The New York Central & Hudson River Railroad Company is one of the carrier corporations which, by consolidation with others December 23, 1914, constituted, and were and are succeeded by, the said applicant; that said applicant is by such consolidation the successor of said The New York Central & Hudson River Railroad Company as party to said indenture and has assumed, and [fol. 26] is chargeable with, all the obligations of said The New York Central & Hudson River Railroad Company in said indenture contained; that by said indenture all shares of the capital stock of said Michigan Central, then owned or thereafter acquired by said The New York Central & Hudson River Railroad Company, were pledged to and with said Guaranty Trust Company of New York, Trustee as aforesaid, to secure the payment of an authorized issue of $21,550,000.00 of the 3½% gold bonds of said The New York Central & Hudson River Railroad Company, payable February 1, 1998; that of said bonds $19,336,000.00 are still outstanding and the collateral pledged, as aforesaid, is still held by said Trustee; that by the terms of said indenture the consent and express approval of the holders of 75% in amount of said bonds is a prerequisite condition, without compliance with which the majority stock of said Michigan Central, held by or for said applicant, may not be voted for any consolidation, merger, sale, transfer or lease of the Michigan Central's property, nor has the said New York Central any power or right to vote the same without first obtaining such consent; notwithstanding which said New York Central and said Michigan Central are threatening to and will consummate said lease involving such transfer, demise and consolidation, without applying for or obtaining such express approval; that in consequence thereof said lease, when so consummated and put into operation, will be void and will constitute and impose a cloud and burden upon the property and property rights of said Michigan Central and its stockholders, including this petitioner; that the holder or holders of some of said 3½% gold bonds have filed protest with said Trustee against its permitting said majority stock of said Michigan Central so held by it as

collateral, as aforesaid, but which still stands on the books of The Michigan Central in the name of said The New York [fol. 27] Central & Hudson River Railroad Company, to be voted in favor of such lease, without the consent of such 75% of said holders of said bonds being first had and obtained; but such protest has not been and will not be complied with and said applicant has not obtained and will not obtain such consent, and in consequence thereof said proposed lease threatens irreparable injury and damage to The Michigan Central and its minority stockholders, including this petitioner.

24. Petitioner further alleged before the Commission and now here alleges that said applicant's lines are parallel and competitive with those of said lessor companies, and that said lessor lines are competitive with one another; also that said proposed leases are not within the corporate powers of either of the companies involved, but each is ultra vires as to each party thereto and is illegal, null and void.

25. Petitioner further says that on the 14th day of January, 1929, the Commission, after trial and hearing of the issues tendered by the said intervening petition of plaintiff and of sundry other issues tendered by the intervening petitions of the Protective Committee of The Cleveland, Cincinanti, Chicago and St. Louis Railway common stockholders, and of sundry short-line railroads connecting with the railroads of the parties to said proposed leases, announced its decision to enter an order of authorization and approval of the New York Central Railroad Company's said petition in Finance Docket No. 5690 for authority to acquire control under lease of the railroads and properties of the Big Four and Michigan Central, and also of the Big Four's said petition in Finance Docket No. 5688 which was heard therewith, but announced further that the entry of the Commission's order of authorization and approval therein would be deferred until compliance with conditions [fol. 28] precedent for the New York Central's acquiring or offering to acquire certain of said short lines should be shown by proper proof, and for this purpose the record would be held open for six months from said last named date, to wit: until July 14th, 1929, and on receipt and consideration of such proof a final order would be entered.

26. Thereafter, on the 2nd day of July, 1929, after the receipt of such proof concerning the acquisition of the said short lines, such final order was entered accordingly. A copy of such final order is hereunto annexed, marked Exhibit "A", and made a part hereof. Petitioner is informed and verily believes that, since the entry of said final order, and within the time thereby limited, defendant, The New York Central Railroad Company, has filed formal acceptance of the conditions prescribed in the orders in said proceeding, and said order has accordingly become effective as of the first day of August, 1929; and the said proposed leases will irrevocably be consummated and carried out, unless the same shall be prevented and enjoined by the order and decree of this Court. Petitioner, as a stockholder in each and all of said lessor and lessee companies, parties to said proposed leased to New York Central, further alleges that the applicant, New York Central, did not, in its application for authority to lease the railroads and properties of said Michigan Central and Big Four companies, ask for authority to acquire any of the so-called "short lines" described in said Commission's order; and that the said Commission was and is without any authority whatsoever to impose upon said applicant, New York Central, any requirement that said applicant company shall acquire any or all of the so-called short lines mentioned in said order; and that such part of said order as requires the applicant to acquire said short lines was and is beyond the jurisdiction of said Commission and was and is wholly [fol. 29] void and of no effect. The said applicant company, before said Commission, contested and resisted the intervening petitions of said short lines and its contentions should have been (but were not) upheld by the Commission, not only because of the lack of power in the Commission to order such acquisitions, but because such short lines were not wanted by and would impose a heavy financial burden upon the applicant company. The effect of the Commission's order is to coerce the applicant into acquiring at its loss a number of the said unprofitable and struggling short lines, for the gain of their owners and thus to deprive the applicant and its stockholders of its and their property without due process of law, in violation of Article XIV of the Amendments of the Constitution of the United States.

27. Petitioner as a stockholder in each and all of said lessor and lessee companies parties to said proposed leases to the New York Central will be irrevocably injured by the carrying out of said leases and the order of the Commission in the premises, and is without any full, complete and adequate remedy at law, and therefore prays for relief in this court of equity, and says that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000) and arises under the Constitution and laws of the United States to regulate commerce and to protect trade and commerce against restraint and monopolies.

Petitioner, therefore, prays for the following relief:

(a) That the defendants appear and answer this Petition, but not under oath, their several answers under oath being hereby expressly waived.

(b) That the said order of the Interstate Commerce Commission on final hearing be set aside and annulled and [fol. 30] the carrying out thereof and of the leases therein and thereby authorized and approved be suspended by preliminary restraining order and interlocutory injunction pending final decree herein and on final hearing be permanently enjoined, and that the officers, directors and agents of the New York Central, Big Four and Michigan Central be so restrained and enjoined from making effective and carrying out said leases.

(c) Petitioner prays for such other and further relief in the premises as shall be agreeable to equity and good conscience.

Petitioner prays for the writ of injunction issued out of and under the seal of this Court, directed to said defendants, restraining them and each of them, during the pendency of this suit, as above prayed.

And petitioner will ever pray, etc.

New York Central Securities Corporation, by Clarence H. Venner, Jr., Vice Pres. & Treas., Petitioner.

Of Counsel:

Frederick A. Henry, of Snyder, Henry, Thomsen, Ford & Seagrave, 914 Williamson Building, Cleveland, Ohio; House, Grossman & Vorhaus, Attorneys for Petitioner, 521 Fifth Avenue, Borough of Manhattan, City of New York.

[fol. 31] *Duly sworn to by Clarence H. Venner, Jr. Jurat omitted in printing.*

[fol. 32] EXHIBIT "A" TO PETITION

Order

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE 2D DAY OF JULY, A. D. 1929

Finance Docket No. 5690

Acquisition of Control by NEW YORK CENTRAL RAILROAD CO.

Finance Docket No. 5688

Acquisition of Control by CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO.

Hearings and investigation of the matters and things involved in this proceeding having been had, and the commission having on January 14, 1929, and on the date aforesaid, made and filed reports containing its findings of fact and conclusions thereon, which reports are hereby referred to and made a part hereof:

It is ordered, That the acquisition by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company of control of the railroad properties of the Cincinnati, Northern Railroad Company and of the Evansville, Indianapolis & Terre Haute Railway Company, and the acquisition by the New York Central Railroad Company of control of the railroad system of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, including all right, title, and interest of said company in the properties of the Cincinnati Northern Railroad Company, the Evansville, Indianapolis & Terre

Haute Railway Company, the Peoria & Eastern Railway Company, and the Kankakee & Seneca Railroad Company, of the railroad system of the Michigan Central Railroad Company, and of the railroad properties of the Chicago, Kalamazoo & Saginaw Railway Company, in accordance with the terms of the proposed leases set forth in the ap-
[fol. 33] plications, and upon the conditions prescribed in said reports, be, and the same are hereby, approved and authorized.

It is ordered, That, within 10 days after the execution thereof, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the New York Central Railroad Company, or either of them acting for both, shall file with this Commission duly verified copies of said leases in the form in which executed.

It is further ordered, That the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the New York Central Railroad Company shall report to this commission as required by valuation order No. 24, effective May 15, 1928.

And it is further ordered, That this order shall become effective 30 days from its date, provided within that time the New York Central Railroad Company shall have filed herein formal acceptance of the conditions prescribed in the orders in this proceeding.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[File endorsement omitted.]

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed Sept. 30, 1929

United States, one of the defendants in the above entitled suit, for answer to the petition therein filed, answers and says:

I

United States admits the truth of the allegations contained in the opening paragraph and in paragraphs 1 to 5, inclusive, of the petition.

II

United States, for answer to paragraphs 6 to 27, inclusive, of the petition, admits and alleges that on July 29, 1926, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company (hereinafter called the Big Four) filed with the Interstate Commerce Commission (hereinafter called the Commission), recorded in Finance Docket No. 5688, for authority under paragraph (2) of section 5 of the Interstate Commerce Act to acquire control, under lease, of the railroads and property (a) of the Cincinnati Northern Railroad Company and (b) of the Evansville, Indianapolis & Terre Haute Railway Company (hereinafter respectively referred to as the Cincinnati Northern and Terre Haute); [fol. 35] that concurrently The New York Central Railroad Company (hereinafter called the New York Central) filed application, recorded in Finance Docket No. 5690, for authority under the same paragraph of the Interstate Commerce Act to acquire control, under lease, (a) of the railroad system of the Big Four, including railroads and properties now controlled and operated by that company under lease or otherwise, the railroads and properties which the Big Four asked authority to lease in its above-mentioned application, and the railroads and properties of the Peoria & Eastern Railway Company and of the Kankakee & Seneca Railroad Company, the latter to be transferred, by the proposed lease, to the New York Central for operation in conformity to certain contracts of the Big Four relating thereto; (b) of the railroad system of the Michigan Central Railroad Company (hereinafter called the Michigan Central) including railroads and properties controlled and operated by that company under lease or otherwise; and (c) of the railroads and properties of the Chicago, Kalamazoo & Saginaw Railway Company (hereinafter called the Kalamazoo); that each proposed lease was to be for the term of ninety-nine years and contained no provision for renewal; that the proceedings so instituted by said applications of the Big Four and the New York Central were

consolidated and entitled "New York Central Unification", and the Commission's reports, hereinafter mentioned, and its order, issued in connection therewith, embraced and included its reports, findings, conclusions and orders in respect of both said applications; that interventions in opposition to said applications were filed by certain minority stockholders, including the New York Central Securities Corporation, the plaintiff herein; and that interventions were filed by certain short-line railroads, and by or on behalf of interests and communities dependent on certain of said short lines for service, asserting in substance that said application should not be granted unless said short-line railroads were included in the proposed unification.

[fol. 36] United States further admits and alleges that the Commission duly made, entered and served upon the parties to said proceedings its report dated January 14, 1929; that subsequently it duly made, entered and served upon the parties to said proceedings its supplemental report and order, dated July 2, 1929; that prior to the making, entering, and serving of said reports and order, as aforesaid, the Commission accorded to the parties to said proceedings, including petitioner herein, the full hearings provided for in the Interstate Commerce Act; that at said hearings a large volume of testimony and other evidence bearing upon the matters covered by said reports and order was submitted to the Commission for consideration, on behalf of said parties, including the petitioner herein, by their respective counsel; that at said hearings questions relating to said matters were fully argued and submitted to the Commission for determination, on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and made and entered said reports and orders, which included the Commission's decisions, findings, conclusions, orders and authorizations in the premises; that upon the evidence before it, and as shown in and by said reports and order, the Commission made the findings and stated the conclusions upon which said order is based.

United States further alleges that said findings and conclusions were and are, and that each of them was and is fully supported and justified by the issues raised and the evidence before the Commission in said proceedings; that, in making said reports and order, the Commission considered and weighed carefully, in the light of its own knowl-

edge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including all material matters covered by the allegations of the petition [fol. 37] herein, that said order was not made or entered by it either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the Commision did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and United States denies each of and all the allegations to the contrary, contained in said petition.

Further answering paragraphs 11, 14 and 15 of the petition, United States denies that the provisions of the proposed leases and the present and proposed relations of the carriers, parties thereto, are such as to constitute consolidation of such carriers within the meaning of that term as used in section 5 of the Interstate Commerce Act.

Further answering paragraph 13 of the petition, United States denies the truth of the allegations therein contained, except that it admits that petitioner made allegations before the Commission substantially as therein stated.

Further answering paragraph 27 of the petition, United States denies that petitioner will be irrevocably injured by the carrying out of said leases and the order of the Commission in the premises.

Except as herein expressly admitted, United States denies the truth of each of and all the allegations contained in said petition, in so far as they conflict either with the allegations herein or with the statements or conclusions of fact included in said reports and order of the Commission.

Wherefore, having fully answered, United States prays that the petition be dismissed at the cost of petitioner, and for such other and further order as may be appropriate.

John Lord O'Brian, The Assistant to the Attorney General. Elmer B. Collins, Special Assistant to the Attorney General. Charles H. Tuttle, United States Attorney.

[fol. 38] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed Oct. 11, 1929

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the petition, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the opening paragraph and paragraphs 1 to 5, inclusive, of the petition, the Commission admits the truth of the allegations therein contained.

II

Answering paragraphs 6 to 27, inclusive, of the petition, the Commission admits and alleges that on July 29, 1926, The Cleveland, Cincinnati, Chicago & St. Louis Railway [fol. 40] Company, hereinafter called the Big Four, filed its application, recorded in Finance Docket No. 5688, for authority under paragraph (2) of section 5 of the Interstate Commerce Act to acquire control, under lease, of the railroads and property (a) of the Cincinnati Northern Railroad Company and (b) of the Evansville, Indianapolis & Terre Haute Railway Company, hereinafter respectively referred to as the Cincinnati Northern and the Terre Haute; that concurrently the New York Central Railroad Company, hereinafter called the New York Central, filed application, recorded in Finance Docket No. 5690, for authority under the same paragraph of the Interstate Commerce Act to acquire control, under lease, (a) of the railroad system of the Big Four, including railroads and properties now controlled and operated by that company under lease or otherwise, the railroads and properties which the Big Four asked authority to lease in its above-mentioned application, and the railroads and properties of the Peoria & Eastern Railway Com-

pany and of the Kankakee & Seneca Railroad Company, the latter to be transferred, by the proposed lease, to the New York Central for operation in conformity to certain contracts of the Big Four relating thereto; (b) of the railroad system of the Michigan Central Railroad Company, hereinafter called the Michigan Central, including railroads and properties controlled and operated by that company under lease or otherwise; and (c) of the railroads and properties of the Chicago, Kalamazoo & Saginaw Railway Company, hereinafter called the Kalamazoo; that each proposed lease was to be for the term of ninety-nine years and contained no [fol. 41] provision for renewal; that the proceedings so instituted by said applications of the Big Four and the New York Central were consolidated and entitled "New York Central Unification," and the Commission's reports, hereinafter mentioned, and its order, issued in connection therewith, embraced and included its reports, findings, conclusions and orders in respect of both said applications; that interventions in opposition to said applications were filed by certain minority stockholders, including the New York Central Securities Corporation, the plaintiff herein; and that interventions were filed by certain short-line railroads, and by or on behalf of interests and communities dependent on certain of said short lines for service, asserting in substance that said application should not be granted unless said short-line railroads were included in the proposed unification.

The Commission further admits and alleges that it duly made, entered and served upon the parties to said proceedings, its report dated January 14, 1929, copy whereof is hereto attached and made a part hereof, marked "Exhibit A"; that subsequently it duly made, entered and served upon the parties to said proceedings its supplemental report and order, dated July 2, 1929, copy whereof is hereto attached and made a part hereof, marked "Exhibit B"; that prior to the making, entering, and serving of said reports and order, as aforesaid, it accorded to the parties to said proceedings, including petitioner herein, the full hearings provided for in the Interstate Commerce Act; that at said hearings a large volume of testimony and other evidence bearing upon the [fol. 42] matters covered by said reports and order was submitted to the Commission for consideration, on behalf of said parties, including the petitioner herein, by their re-

spective counsel; that at said hearings questions relating to said matters were fully argued and submitted to the Commission for determination, on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and made and entered said reports and order, which included the Commission's decisions, findings, conclusions, orders and authorizations in the premises; that upon the evidence before it, and as shown in and by said reports and order, the Commission made the findings and stated the conclusions upon which said order is based.

The Commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the issues raised and the evidence before the Commission in said proceedings; that, in making said reports and order, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including all material matters covered by the allegations of the petition herein, that said order was not made or entered by it either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the Commission denies each of and all the allegations to the [fol. 43] contrary, contained in said petition.

Further answering paragraphs 11, 14 and 15 of the petition, the Commission denies that the provisions of the proposed leases and the present and proposed relations of the carriers, parties thereto, are such as to constitute consolidation of such carriers within the meaning of that term as used in section 5 of the Interstate Commerce Act.

Further answering paragraph 13 of the petition, the Commission denies the truth of the allegations therein contained, except that it admits that petitioner made allegations before the Commission substantially as therein stated.

Further answering paragraph 27 of the petition, the Commission denies that petitioner will be irrevocably injured by the carrying out of said leases and the order of the Commission in the premises.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained

in said petition, in so far as they conflict either with the allegations herein or with the statements or conclusions of fact included in said reports and order of the Commission, which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove, as this honorable court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by Daniel W. Knowlton, Chief Counsel.

[fol. 44] *Duly sworn to by Balthasar H. Meyer. Jurat omitted in printing.*

[fol. 45] EXHIBIT "A" TO ANSWER OF I. C. C.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 5690

New York Central Unification

[fol. 46] Finance Docket No. 5690[1]

New York Central Unification

Submitted August 13, 1928. Decided January 14, 1929

1. Acquisition by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company of control, under lease, of the railroad properties (a) of the Cincinnati Northern Railroad Company and (b) of the Evansville, Indianapolis & Terre Haute Railway Company, and acquisition by the New York Central Railroad Company of control, under lease, (a) of the railroad system of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, including all right, title, and interest of said company in the properties of the Cincinnati Northern Railroad Company, the Evansville, Indianapolis & Terre Haute Railway Company, the

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[1]This report also embraces Finance Docket No. 5688, Acquisition of Control by Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

Peoria & Eastern Railway Company, and the Kankakee & Seneca Railroad Company, (b) of the railroad system of the Michigan Central Railroad Company, and (c) of the railroad properties of the Chicago, Kalamazoo & Saginaw Railway Company, found to be in the public interest upon condition prescribed.

2. Entry of order of authorization and approval deferred.

Robert J. Cary, Clyde Brown, Crosby J. Beakes, John K. Graves, and C. A. Halpin for applicants.

Wilber M. Brucker, attorney general, and K. F. Clardy, assistant attorney general, for State of Michigan; John W. Bricker and A. M. Calland for Public Utilities Commission of Ohio; Root, Clark, Buckner, Howland & Ballantine, Elihu Root, jr., Grenville Clark, and Lowell Turrentine for protective committee of Cleveland, Cincinnati, Chicago & St. Louis Railway Company common-stock holders; Snyder, Henry, Thomsen, Ford & Seagrave and Frederick A. Henry for New York Central Securities Corporation; J. Harry Covington and Dean Acheson for Boyne City, Gaylord & Alpena Railroad Company; O'Hair & McClain for Casey & Kansas Railroad Company and Kansas & Sidell Railroad Company; John W. Simpson, second, for receivers of Delaware & Northern Railroad Company; Moultrie Hitt, Clarence A. Miller, and G. Kibby Munson for Chicago, Attica & Southern Railroad Company and Southern New York Railway, Incorporated; C. C. McChord, R. Granville Curry, and Frederick M. Dolan for Federal Valley Railroad Company; Hornblower, Miller & Garrison, Edward C. Bailly, and W. R. Begg for Fonda, Johnstown & Gloversville Railroad Company; Clifford H. Browder for Owasco River Railway; [fol. 47] H. H. Fleming, James W. Carmalt, and Carmalt & Koplin for Ulster & Delaware Railroad Company; Beecher W. Waltermire for district No. 6, United Mine Workers of America, Black Diamond Coal Company, Jennings Coal Company, Schuler Coal Company, Federal Creek Coal Company, and Chamber of Commerce of Athens, Ohio; and H. S. Ballard for Ohio Farm Bureau Federation and Ohio Farm Bureau Service Company, interveners.

Earl E. Bockstedt for certain shippers on Owasco River Railway; Eugene W. Small for Ida Small, holder of New York Central & Hudson River Railroad Company 3½ per

cent Lake Shore collateral bonds; and Moultrie Hitt, Clarence A. Miller, and G. Kibby Munson for Grasse River Railroad Corporation and Skaneateles Railroad Company.

Report of the Commission

By the COMMISSION:

Exceptions to the report proposed by the examiner were filed by the parties hereinafter referred to as the minority stockholders, and the case has been orally argued. Our conclusions differ from those proposed by the examiner.

This is a consolidated proceeding upon applications concurrently filed, on July 29, 1926, by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, hereinafter called the Big Four, and the New York Central Railroad Company, hereinafter called the New York Central, carriers by railroad engaged in the transportation of passengers and property subject to the interstate commerce act:

By its application, recorded in Finance Docket No. 5688, the Big Four asks authority under paragraph (2) of section 5 of the act to acquire control, under lease, of the railroads and property (a) of the Cincinnati Northern Railroad Company and (b) of the Evansville, Indianapolis & Terre Haute Railway Company, hereinafter respectively referred to as the Cincinnati Northern and the Terre Haute.

The New York Central's application, recorded in Finance Docket No. 5690, is for authority under paragraph (2) of section 5 to acquire control, under lease, (a) of the railroad system of the Big Four, including railroads and properties now controlled and operated by that company under lease or otherwise, the railroads and properties herein proposed to be leased to the Big Four, and the railroads and properties of the Peoria & Eastern Railway Company and of the Kankakee & Seneca Railroad Company, the latter to be transferred, by the proposed lease, to the New York Central for operation in conformity to certain contracts of the Big Four relating thereto; (b) of the railroad system of the Michigan Central Railroad Company, hereinafter called the Michigan [fol. 48] Central, including railroads and properties controlled and operated by that company under lease or otherwise; and (c) of the railroad and properties of the Chicago, Kalamazoo & Saginaw Railway Company, hereinafter called the Kalamazoo.

Request is also made in both applications for authority under any and all other pertinent provisions of the interstate commerce act to enter into the proposed identures of lease, to exercise the rights therein granted, and to assume and carry out the obligations and agreements therein contained. The record contains no further reference to these requests. Manifestly they lack sufficient particularity to present any definite matter for our consideration. Responsibility for obtaining all authority necessary in the premises must remain with the applicants.

The Governor of Ohio entered protest against the application recorded in Finance Docket No. 5690 unless the Federal Valley Railroad Company, hereinafter called the Federal Valley, is taken over by the New York Central. The Public Utilities Commission of Ohio intervened on behalf of the people of the territory served by the Federal Valley.

A hearing was held at Washington, D. C., in January, 1927. Parties permitted to intervene prior to and at the hearing may be classified generally as carrier companies owning and operating relatively short lines of railroad, minority stockholders, and labor, industrial, and commercial organizations having interests in Athens and Morgan Counties, Ohio, and will be referred to herein, by classes, as the short lines, the minority stockholders, and the Ohio interests, respectively. The intervening minority stockholders will be designated with greater particularity, as follows: The protective committee of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company common-stock holders, as the protective committee; and the New York Central Securities Corporation, as the securities corporation. The minority stockholders ask that the application of the New York Central be denied.

At the original hearing, testimony adduced in support of the contentions of the short lines was not contradicted, the applicants having been content to contest its relevancy. Subsequently, however, the applicants sought the opportunity to be heard in the matter. This request was granted and, accordingly, the applications came on for further hearing in January, 1928. Leave to intervene was granted to seven additional short lines, of which two withdrew without producing witnesses; and the State of Michigan intervened on behalf of the Boyne City, Gaylord & Alpena Railroad

Company, hereinafter called the Alpena, and the people served thereby.

[fol. 49] Purpose of Proposals

It was testified on behalf of the applicants that the railroads of the New York Central, the Big Four, and the Michigan Central comprise the major portion of the system known as the New York Central lines. The properties of these three carriers are operated as separate units, but the companies are under common control. While such control has enabled some progress to be made in the unification of terminals and coordination of operation, the necessity of protecting earnings of each carrier prevents further unification and coordination. The purpose of the proposed leases, it is stated, is to bring about handling of the properties by one strong operating unit.

Physical Relationships

The New York Central is a corporation which was formed in 1914 under the laws of New York, Pennsylvania, Ohio, Michigan, Indiana, and Illinois by the consolidation of 11 carrier companies, including the New York Central & Hudson River Railroad Company and the Lake Shore & Michigan Southern Railway Company. The agreement of consolidation provides that the consolidated company shall continue for 50 years. Properties operated by the New York Central include a main stem extending from New York City to Chicago by way of Albany and Buffalo, N. Y., Erie, Pa., Cleveland and Toledo, Ohio, and Elkhart, Ind.; and various connecting lines, owned, leased, and operated under trackage rights, in the States of New Jersey, New York, Massachusetts, Pennsylvania, Ohio, West Virginia, Indiana, Michigan, and Illinois, and in the Dominion of Canada.

The Big Four was formed in 1889, under the laws of Ohio and Indiana, by the consolidation of three constituent companies. In general, the Big Four system, including lines leased, owned, and operated under trackage rights, comprises a through line extending from a connection with New York Central rails at Cleveland, through Indianapolis, Ind., to St. Louis, Mo.; lines radiating from Indianapolis to

Peoria, Ill., to Chicago, to Springfield, Ohio, and to Cincinnati, Ohio; and intersecting north-and-south lines from Danville, Ill., to Cairo, Ill., from Benton Harbor, Mich., to Louisville, Ky., and from Cincinnati to Springfield, whence two lines diverge to Toledo, and to Columbus, Ohio, and beyond.

The Michigan Central is a Michigan corporation. The main stem of this carrier, formed by the inclusion of lines operated under lease and under trackage rights, extends from Buffalo, Suspension Bridge, and other points on the Niagara frontier, along the north shore of Lake Erie and through the Dominion of Canada, to Windsor, Ontario, thence to Detroit, Mich., and across the southern part of the Lower Peninsula of Michigan and along the south shore of [fol. 50] Lake Michigan, to Chicago. Connecting system lines form a network of railroads in southern Michigan and include also branches from Detroit and Jackson which converge at Bay City, whence a line extends northward to Mackinaw City on the Straits of Mackinac.

The Kalamazoo was organized under the laws of Michigan in 1883 for a term of 99 years. This company owns and operates a line of railroad extending from Woodbury, through Kalamazoo, where connection is made with Michigan Central and New York Central rails, to Pavilion Junction, all in the State of Michigan. The Kalamazoo also owns a line from Pavilion Junction to Pavilion, Mich., approximately 9.44 miles, which is leased to the Grand Trunk Railway system.

The Cincinnati Northern is a corporation which was organized in June, 1894, under the laws of Ohio. The line of this carrier extends from a connection with the main line of the Michigan Central at Jackson, Mich., to a connection with the Big Four's Cincinnati-Springfield line at Franklin, Ohio, 205.14 miles. From Franklin to Cincinnati, about 39 miles, the Cincinnati Northern operates over the line of the Big Four.

The Terre Haute was organized in June, 1920, under the laws of Indiana for the purpose of taking over, for ownership and operation, certain railroad properties formely owned by the Evansville & Indianapolis Railroad Company. The line of the Terre Haute extends southward from a connection with a line of the Big Four at Terre Haute to Evans-

ville, 139.77 miles, all in the State of Indiana. It appears that this company also operates over 6.49 miles of railroad under trackage rights.

With further reference to physical relationships of the various railroad properties concerned, there have been furnished in the record condensed profiles from which it is contended that gradients of the various system lines are such as to form natural channels for the flow of traffic between the Atlantic seaboard and Michigan, the Middle West, etc.

Mileage

The following statement is a recapitulation of testimony as to operated main-line mileage involved in the unification proposed herein:

Owned and leased lines:	Miles
New York Central	6,376.89
Big Four	2,220.85
Michigan Central	1,762.30
Kalamazoo	55.35
Cincinnati Northern	205.14
Terre Haute	139.77
Total	10,760.30
Lines operated under trackage rights	747.51
Grand total	11,507.81

[fol. 51] Including second, third, and fourth main-line tracks, yard tracks, and sidings, there are involved in the proposals 26,090.38 miles of track, of which 1,244.54 miles are used under trackage agreements.

Traffic Relationships

The Big Four has a peculiar value to the New York Central Lines. Big Four system lines traverse territory in Ohio, Indiana, and Illinois, which is well settled, has diversified industries, and is growing. The lines of the Big Four in these important industrial and agricultural sections of the Middle West, in connection with the main stem of the New York Central, afford transportation facilities between that territory and the Atlantic seaboard, and by reaching Ohio, Mississippi, and Illinois River crossings, extend the New York Central lines to connections with the South, Southwest, and West. The Big Four origi-

nates coal in Illinois and, through the Cincinnati gateway, handles Kentucky and West Virginia coal, which moves in system interchange to New York Central and Michigan Central territories.

With reference to the Michigan Central and New York Central lines which traverse opposite shores of Lake Erie, it is stated that by reason of switching absorption tariffs through traffic may originate at the same points and receive the same deliveries via either line. Through traffic in both directions comprises about 10 per cent of the total traffic handled by the lines. The movement eastbound predominates and this traffic converges at Buffalo, from which point the New York Central's main stem affords the only system route to the Atlantic seaboard. At the Niagara frontier the New York Central interchanges with the Michigan Central through traffic destined to points west and northwest of Lake Erie, and retains for movement over its own lines through traffic (not otherwise routed by shippers) destined to points south and southwest of the lake. Through traffic to or from Chicago and points west may be routed by the shipper, at the same rates, over the line of the Michigan Central or over the New York Central's Chicago-Buffalo line. With respect to the industrial territory of southern Michigan, widely served by both carriers, it appears that the New York Central, in conjunction with the Big Four, handles coal and raw materials inbound, while the Michigan Central originates the finished products of manufacture. It is contended that the lines of the Michigan Central and the New York Central are essentially complementary, and that this complementary relationship under common control has continued, with advantage to the public, for nearly 50 years.

The Cincinanti Northern's freight traffic consists principally of coal moving through the Cincinnati gateway and [fol. 52] handled in interchange with the New York Central and the Michigan Central. The freight traffic of the Terre Haute also consists largely of coal delivered to the Big Four at Terre Haute for system distribution. The Terre Haute's line extends in the same general direction as the Big Four's line from Danville to Cairo, but is from 25 to 35 miles distant on the opposite side of the Wabash River, and the lines serve different territories. It is stated that

the lines operated by the Kalamazoo and the New York Central do not serve the same territory, but the record is silent as to the particular function performed by the Kalamazoo in the New York Central lines.

Testimony concerning the number of junction points at which traffic is interchanged between lines of the lessor and lessee companies is summarized below:

	Big Four	Michigan Central	Kalamazoo	Cincinnati Northern	Terre Haute	Total
New York Central	20	22	1	2	[1]	45
Big Four	....	2	[1]	5	1	8
Michigan Central	[2]	.....	2	1	[1]	3
Grand total	....	.....	.....	.....	...	56

[1] Lines do not connect. [2] See line 2, column 2.

Upon the daily basis of an 8-day test period ended March 23, 1926, the average daily interchange of all cars, loaded and empty, between lines of the lessor and lessee companies is estimated as follows:

	Big Four	Michigan Central	Cincinnati Northern	Kalamazoo	Terre Haute
New York Central	2,324	1,741	59	23	[1]
Big Four	....	396	442	[1]	395
Michigan Central	[2]	.....	247	75	[1]

[1] Lines do not connect. [2] See line 2, column 2.

During the year ended September 30, 1926, cars interchanged between the various lines aggregated 1,979,703, of which 1,193,472 were loaded and 786,231 were empty. The interchange between the Big Four, the Cincinnati Northern, and the Terre Haute during the same period amounted to 168,662 loaded cars and 138,348 empties, a total of 307,010 cars.

Intercorporate Relations

Construction of various railroads now forming parts of the New York Central Lines appears to date back to 1826. In 1873, certain individuals, identified generally as the Vanderbilt group, who already owned a majority of the capital stock of the original New York Central Railroad [fol. 53] Company (incorporated 1853), acquired control of the Lake Shore & Michigan Southern Railway Company.

The same group subsequently acquired control of the Canada Southern Railway Company, lessor of the Suspension Bridge-Windsor line operated by the Michigan Central (1876), of the Michigan Central itself (1878), and of the Big Four (1889). Eventually the interests of the Vanderbilt group in these companies were transferred to one or the other of the major constituent companies entering into the consolidation of 1914. Control of the Cincinnati Northern, the Kalamazoo, and the Terre Haute dates from 1901, 1906, and 1920, respectively.

Prior to June 27, 1922, the New York Central owned $30,207,700, or approximately 64 per cent, of the common stock of the Big Four, but did not own any of the preferred stock. On the date mentioned we authorized the New York Central to acquire further control of the Big Four by the purchase of additional stock, common and preferred. Control of Big Four by New York Central 72 I. C. C. 96. It is conceded in the record that officers of the New York Central had in mind that if two-thirds of the stock were acquired, a lease of the Big Four properties might be consummated without persuading minority stockholders that it was to their advantage.

Carrier companies involved in the proposal of the New York Central are now controlled, directly or indirectly, by that company as indicated in the following tabulation of stock ownership.

Company	Par value outstanding[1]	Owned by New York Central or a subsidiary company		Owned by minority interests	
		Par value	Per cent	Par value	Per cent
Big Four:					
Common stock	$47,028,700	$42,941,100	91.31	$4,087,600	[2] 8.69
Preferred stock	9,998,500	8,468,100	84.69	1,530,409	15.31
Michigan Central	18,736,400	18,584,100	99.19	152,300	0.81
Kalamazoo	450,000	180,000	100.00	.....	.....
		[3] 270,000			
Cincinnati Northern	3,000,000	[4] 2,931,600	97.72	68,400	2.28
Terre Haute	4,290,000	[4] 4,290,000	100.00	.....	.....

[1] All shares of the par value of $100.
[2] Of which $2,360,900 is represented by the protective committee.
[3] Owned by the Michigan Central.
[4] Owned by the Big Four.

Common executives serve both the New York Central and the subsidiary companies, the parent company and the subsidiaries also having interlocking directors. While the

boards are not identical in personnel, 13 of the 15 directors serving the Big Four and the Michigan Central also serve the New York Central in similar capacities.

[fol. 54] Book Investment

Information, according to the books of the carriers, as to investment in road and equipment and other investments, current assets and liabilities, funded debt, etc., is contained in balance sheets as of November 30, 1927, submitted in the record. The properties of the Big Four are in excellent condition, 96 per cent of all main tracks having been relaid with new and heavier rail in the 5-year period 1921-1925. Passenger equipment is maintained to the New York Central standard. On November 1, 1925, the Big Four had a lower percentage of locomotives and freight cars in bad order than any of five standard railroads.

Income and Dividends

There are also furnished in the record income statements of the lessor and lessee companies for each calendar year from January 1, 1921, to December 31, 1926, and for the 11 months ended November 30, 1927. The minority stockholders contend that, beginning with 1925, the amounts of net income shown for the Big Four and the Michigan Central should be increased because of a change made in the method of accounting for pensions, whereby amounts earned in those periods were charged not only for pension payments actually made but also with estimated amounts required to be paid in the future on account of pensions going into effect in those periods.

Recent years, beginning with 1921, have witnessed increased efficiency in the operation of Big Four properties. The loading of freight trains has steadily improved and the operating ratio decreased from 80.7 per cent in 1921 to 72.8 per cent in 1925. Tonnage and revenue statistics for the 5-year period are as follows:

Year	Tonnage	Freight revenue	Total railway operating revenue
1921	30,043,000	$56,289,898	$79,793,593
1922	35,828,000	61,596,944	84,665,690
1923	44,856,000	69,395,847	94,941,444
1924	43,072,000	64,101,391	87,712,381
1925	45,387,000	68,196,253	92,061,069

Since 1922 the Big Four passenger revenues have remained fairly constant. Increases in freight traffic have not been limited to particular classes or commodities. For example, manufactured products and miscellaneous less-than-carload freight, and forest products, have increased approximately 50 per cent and 40 per cent, respectively, over similar tonnage handled in 1921. Unless the consumption of fuel should diminish in Big Four territory, varying [fol. 55] economic conditions affecting the production of coal in various districts would not necessarily affect the Big Four's coal traffic, except possibly as to length of haul, since the carrier can continue to supply coal from other districts served.

The table immediately following presents a résumé of testimony as to net income earned per share of Michigan Central stock, and per share of Big Four common stock, after provision for the preferred, and as to dividends actually paid, together with ratios computed therefrom:

Stock	Net income per share	Dividend payments per share	Ratio of dividends to net income per share
Big Four, common:			Per Cent
1921	$4.95	....	....
1922	14.74	$5.00	33.9
1923	23.55	4.00	17.0
1924	16.03	5.00	31.2
1925	[1] 23.65	5.50	23.2
1926	[1] 23.95	7.00	29.2
1927 [2]	[1] 17.26	([3])	....
Michigan Central:			
1921	41.23	6.00	14.5
1922	68.41	14.00	20.5
1923	75.66	20.00	26.4
1924	72.73	20.00	27.5
1925	[1] 102.40	27.50	26.8
1926	[1] 105.69	35.00	33.1
1927 [2]	[4] 89.77	[5] 40.00	44.5

[1] As adjusted by the minority stockholders for pension payments charged in advance, less income tax.

[2] Estimated, upon the basis of figures available for first 11 months and the ratio of net income for similar months of 1926 to net income earned during the entire year.

[3] Not available in record.

[4] Data not available for adjustment mentioned in preceding note.

[5] Not including 50 per cent extra dividend from accumulated surplus paid in September, 1927.

The protective committee challenges the significance of the decrease in the Big Four's net income indicated by a comparison of the figures for 1926 and 1927. From comparative statistics for 11-month periods of each of these

years it appears that total operating revenues decreased only 2.5 per cent, or 1.6 per cent less than the average decline of 4.1 per cent for 11 principal railroads in the Northeast. The decrease in net operating income was 16.7 per cent, which was about 3.3 per cent in excess of the corresponding decline in the case of the New York Central. The protective committee surmises that the less favorable showing of the Big Four's earnings in 1927 may be due to variation in policy as to maintenance expenditures, which, in the case of the Big Four, were reduced only 1 per cent, as compared with a reduction of 2.7 per cent in the case of the New York Central and an average reduction of 7 per cent for roads in the Central Eastern district.

Concerning dividend policies it was testified that during the years 1923 to 1926, 10 well-conducted railroad companies of the United States have paid as dividends about one-half of amounts available for that purpose and retained the remainder for other corporate purposes. During the past five years the New York Central has paid dividends on its common stock amounting to approximately [fol. 56] 51 per cent of available funds. The table next following affords a comparison of dividends paid on Michigan Central stock and Big Four common stock, with net earnings of those companies in the years 1921-1926:

	Michigan Central	Big Four
Aggregate net income	$95,645,003	$52,959,880
Less, dividends on preferred stock	.....	2,999,550
	95,645,003	49,960,330
Dividends paid	22,952,090	[1] 12,462,605
Ratio of dividends to net income available (per cent)	24	25

[1] Common stock.

Preliminary Transactions

The decision to lease the properties of the Big Four and Michigan Central was definitely reached by New York Central executives some time during the winter and spring of 1926. As a result of certain negotiations conducted in the early months of that year nearly 7,000 shares of Michigan Central stock were purchased at $1,000 per share. Offers made to Big Four stockholders from time to time had been largely accepted and the shares still outstanding in the

hands of other parties were scattered among a large number of holders, so that there seemed to be no one representing all such stockholders with whom negotiations might be had, although it would appear that the existence of the protective committee was known at the time application was made to us. In any event, every one who considered the leases was interested from the viewpoint of the New York Central, and ideas of minority stockholders as to appropriate rentals under the proposed leases were neither sought nor obtained, except as opportunity for expressing their views may have been accorded the minority at stockholders' meetings called for the purpose of passing upon prior action by the boards of directors.

Studies of the subject of rentals led to the preparation of certain memoranda hereafter referred to in this report. In this connection it is stated that a great many considerations enter into the question as to what is a fair rental under a lease, and that it is a matter of judgment.

Execution of the proposed leases was authorized on June 9, 1926, by the common directors of the lessor and lessee companies, subject to the consent of the holders of not less than two-thirds in amount of the capital stock of the respective companies. It appears that during September, 1926, the consent of a sufficient number of the stockholders was given in all cases except that of the proposed lease from the Big Four to the New York Central. Voting upon that proposal by the New York Central of the Big Four [fol. 57] stock owned by it was enjoined by interlocutory decree in a suit brought in the United States District Court at Cincinnati. On November 17, 1927, the decree was reversed by the Circuit Court of Appeals, Sixth Circuit, in an opinion in which the court expressed the view that, in making the findings required by the statute, it is our duty to protect both public and private interests, but observed that our orders in such matters are subject to judicial review on behalf of a stockholder, whence it follows that, before a lease can be made effective, an objecting stockholder has the right to present his case before two tribunals, both of which are charged with the duty of protecting his interest. Cleveland, C., C. & St. L. Ry. Co. v. Jackson, 22 F. (2d) 509. Action by the stockholders of the Big Four followed in January, 1928.

Provisions of Proposed Leases

The proposed leases are fundamentally alike. They are to be dated, for identification, as of October 1, 1926, and each lease is to be for a term of 99 years except as rights, titles, interests, and estates in leaseholds, contracts, etc., of the lessor companies may expire and not be renewed. In general, each lease covers all the lessor's owned and leased lines of railroad, leaseholds, and all other properties, real, personal, and mixed, contracts and franchises (except the franchise to be a corporation), equipment, materials and supplies, after-acquired property, and securities and investments (excepting, however, the books and records of the lessor, special deposits, and securities issued or assumed and nominally outstanding), and the lessor assigns to the lessee, during the term of the lease, the income from securities, investments, etc., of the lessor. Special provision is made for the transfer to the lessee of cash and current assets, other than materials and supplies, mentioned above, for the application of such assets to the liquidation of current and deferred liabilities, and for an accounting with respect thereto upon the expiration or earlier termination of the lease.

As rent for the demised premises, the lessee covenants and agrees to pay to the lessor, or for its account, sums required to maintain its corporate existence, taxes and special assessments levied upon the properties, interest on issued or assumed securities now outstanding and hereafter issued or assumed by the lessor, rentals and charges accruing under leases and contracts, etc., for which the lessor is or may become liable, and specified amounts upon each share of the lessor's capital stock not owned by the lessee.[1]

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[1] Also, in the case of the proposed Michigan Central lease, such dividends on the shares of Michigan Central stock pledged as collateral with the Guaranty Trust Company of New York, trustee under the New York Central & Hudson River Railroad Company's collateral trust indenture dated April 13, 1898, as will enable the trustee to pay the 3½ per cent interest due on $21,550,000 of bonds secured by the pledge of such stock.

[fol. 58] The rentals thus last reserved are equivalent to annual dividends upon the various stocks at the following rates:

	Per cent
Big Four stock:	
Preferred	5
Common	10
Michigan Central stock	50
Cincinnati Northern stock	12
Kalamazoo stock	6
Terre Haute stock	4

Since each lessee expressly waives all right to participate as stockholder of the lessor in any dividend or distribution during the term of the lease from rentals payable thereunder, the extent of the obligation ultimately to be assumed by the New York Central in that regard is limited to minority holdings. Minority stockholders are accorded the option of accepting such rentals or selling their stock to the lessee at fair values to be determined by agreement or by arbitration.

The lessee further agrees to maintain the leased properties, to assume and perform during the term of the lease obligations of the lessor under existing leases, mortgages, and other contracts relating to the premises, and to indemnify the lessor against all loss or damage arising out of operation of the properties by the lessee.

For any expenditures for capital purposes, including the making of extensions, additions and betterments, and the discharge of outstanding securities, the lessee is to be entitled to be reimbursed with stock, bonds, or other securities of the lessor. Shares of stock are to be accepted by the lessee at their fair value, not less than par, as agreed upon or determined by arbitration. Bonds, notes, etc., are to be accepted at face value, but upon termination of the lease there is to be an accounting between the parties as to any difference between the face value and the fair value of such securities. Advances by the lessee of amounts which may be necessary to be paid by the lessor under guaranties of securities of other companies or as contributions or advances to terminal or other companies are to bear no interest during the term of the lease.

The issue of securities by the lessor is to be subject to the consent of the lessee, which will have the right to elect the class of securities to be issued and to determine the terms and conditions thereof, subject to our approval. Any saving or benefit resulting from refunding or rearranging securities of the lessor is to inure to the benefit of the lessee during the term of the lease.

Regarding securities and investments to be taken over by the lessee or thereafter acquired by the lessor, the lessee is to be entitled to receive and own all current income accruing thereon, to vote all shares of stock, to pledge or [fol. 59] otherwise dispose of such securities with the approval of the directors of the lessor, and to receive, subject to the lease and as a part of the leased premises, all amounts which may become payable or distributable upon such securities or investments other than ordinary current dividends, interest, and income, and to apply the same in such manner and for such purposes as may be approved by the directors of the lessor upon written request of the lessee.

Provision is made for termination of the lease and reentry in case of default, for the substitution of successors and assigns of the parties, for arbitration of disputes, and for modification of terms and provisions with the exception of those pertaining to rentals and to the appraisement and purchase of minority shares of the lessor.

Under the terms of the proposed leases, the lessees may abandon, retire, sell, or otherwise dispose of any line or lines of railway, etc., not required in the judgment of the lessees for proper operation and maintenance of the demised premises.

The Issues

Issues raised by the proposals of the applicants and the contentions of interveners relate generally to the test of public interest prescribed by the statute, to terms and conditions of the proposed leases, and to our jurisdiction under the provisions of law invoked.

Reasons Urged in Support of Proposals

On behalf of the applicants it is contended that the New York Central lines have been built up with a view to a

properly coordinated system. The opinion was expressed in the testimony that the leases are steps leading in the direction of consolidation.

In practice it is expected to maintain existing routes and to comply with routes designated by shippers, but it is hoped that arrangements ultimately may be worked out with the shippers, with our approval, and with foreign connections, which will afford freedom of operation as to the routing of freight and thereby promote better and more economical service. In the testimony, advantages expected to accrue to the public are approached from the viewpoints of traffic, transportation, accounting, and maintenance of equipment.

1. Revision of routes, both within the system and interline, has been hampered by a proper regard for minority interests. The proposed leases would eliminate objection, on that score, to the short-hauling of lessor lines. Any changes with respect to internal routes and interchange gateways would be made subject to approval by us, the shipping and traveling public, and foreign connecting lines. Considering the large amount of mileage which would be under single operating control, the volume of traffic, and [fol. 60] the possibility of using alternate routes, it is thought that substantial improvements may be made. Shorter routes should lower transportation costs and increase net earnings, but no estimate of definite results is ventured.

There are at present three major traffic departments for the lines involved. Each of the traffic departments is to be maintained, with no change in tariff and rate jurisdiction. Michigan Central-New York Central, lessee, and Big Four-New York Central, lessee, are to be used as trade names. Under single operation, rates of the several traffic units are to be interchangeable so that it will be possible to improve routings of traffic. No routes desired by the public are to be closed, but, in the absence of contrary shipping instructions, the most efficient will be considered the regular routes. Freight will be solicited for movement over the most economical routes, the unit obtaining the traffic to get credit for the traffic regardless of the route over which it is forwarded. The cost of solicitation will remain substantially the same as at present. If shorter routes are

used as freely as anticipated the resultant saving in mileage will be quite large. Diversion of traffic from longer routes is not, generally speaking, to interfere with local service. It is not expected that all the traffic will necessarily take the shorter routes.

2. Possible new routes, graphically illustrated in the record, are practicable operating routes and can be used advantageously for the transportation of traffic. Most of them are available for use at present, but in some instances physical improvement would be necessary were a large volume of traffic diverted to such routes. In March, 1927, a study was made of traffic moving through certain gateways, during a period of 10 days, for the purpose of determining the approximate volume of such traffic capable of movement via more direct routes and the saving in mileage which might be effected by rerouting. It appeared from this study that approximately 6.5 per cent of the cars passing through the particular terminals could have moved under other circumstances, by shorter routes. Upon the assumption that the period selected was fairly typical, an adjustment of the results of the study to an annual basis showed a potential aggregate saving of 11,796,789 car-miles per year through direct routing. Applying car-mile costs to this possible saving, the decrease in transportation expenses would amount to approximately $1,000,000 annually. The figures submitted are merely indicative of possibilities, but the amount stated is claimed to be probably an underestimate of what might be done.

Unified operation as proposed would also tend to reduce yard movements and terminal switching now required, to permit the routing of freight away from congested ter- [fol. 61] minals, and to bring about better train building. At points common to lines of two or more of the companies terminal operations are conducted on a contractual basis which involves intricate and accurate accounting and which is subject to change with changing conditions of various kinds.

From the transportation viewpoint, benefits of the proposals of the applicants are summarized as follows: Savings in car-miles, affecting time in transit and deliveries; a better car supply, through expeditious movement of

traffic; and substantial economies in the cost of operation through more effectual train grouping, reduced yard operations, and elimination of duplicated effort and simplification of accounting at common terminal points. No estimate has been furnished as to amounts of money which may thus be saved for the stated reason that the matter is so complicated that any attempt to make an estimate would be open to serious question as to the accuracy of the result.

3. Operation of the various lines as a unit would permit the adoption of a unified accounting system adapted to the needs of the organization as a whole, as contrasted with exact accounting now required for each company. Economies could be effected by the substitution of arbitrary charges for detailed accounting required in the matter of joint facilities and by the simplification or elimination of records, reports, billing, correspondence, etc., incident to the exchange of equipment, equipment repairs, interline freight and passenger traffic, and joint expenses. The applicants' witness was confident that substantial economies in accounting would follow unified operation, but explained that, in his opinion, economies do not always mean a cash saving, but sometimes afford the opportunity of getting more service for the same money.

4. The major advantage of the proposed leases from the viewpoint of the repair of equipment would be in relation to main shops where general repairs are handled. It appears that main shop facilities are generally adequate except at West Albany, N. Y., and Collinwood, Ohio, on the New York Central, and at West Detroit, Mich., on the Michigan Central, where extensions estimated to cost $7,000,000 are in contemplation. Through use of facilities available on the Big Four these expenditures can be indefinitely deferred, with a resulting saving in carrying charges. Other economies may be effected by the combination or closing of some smaller shops, and for the future it would be beneficial to consider any extensions or replacements of existing facilities from the viewpoint of a unit rather than from that of two or three carriers. Unified operation of the lines would permit increased flexibility in the repair of equipment and would facilitate the

transfer of locomotives from one line to another for transportation purposes.

[fol. 62] The Short Lines

The applicants have undertaken to furnish information concerning the general short-line situation. Including lines not exceeding 500 miles, but excluding lines owned, controlled, or operated as parts of general railroad systems, it is stated that there are 71[1] short-line railroads which connect with the New York Central lines. Of these railroads, 9[1] are represented by interveners herein, leaving 62 which have not intervened or had any part in this proceeding. The latter are classified as follows:

	Power		
	Steam	Electricity[1]	Total
Affiliated with or controlled by industries	32	5	37
Independent of industrial affiliation or control	14	11	25
Total	46	16	62
Aggregate mileage	2,045.30	2,016.54	[2]4,061.84

[1] Wholly or in part.
[2] Affiliated with or controlled by industries, 1,593.78 miles.

The following tabulation summarizes the applicant's classification of the 71 short lines as to connections:

	Lines connecting with New York Central lines and—			
	No other railroad	One other railroad	Two or more other railroads	Total
Industrially affiliated or controlled:				
Steam	10	5	20	35
Electric[1]	2	1	2	5
Total	12	6	22	40
Independent:				
Steam	3	3	13	19
Electric[1]	5	1	6	12
Total	8	4	19	31
Grand total	20	10	41	71

[1] Wholly or in part.

From data contained in reports to us, where available, supplemented by reports to State authorities and reports

[1] Counting as one the continuous line formed by the Casey & Kansas and Kansas & Sidell Railroads.

to stockholders, and from data contained in books of reference and in records of the New York Central lines, an exhibit was compiled and submitted in the record to present, for all the connecting short lines, information concerning location, ownership, or control, financial position, income, equipment, and traffic, and indicating whether or not joint rates are in effect.

[fol. 63] It is stated that no serious propositions have been made to the management of the New York Central lines with respect to terms and conditions under which any of the nonintervening short lines desire or may desire to be included in the proposed unification. We assume that the 62 short-line carriers whose railroads connect with the New York Central lines, but which have not intervened herein, and those parts of the public served by those carriers, are content, for the present at least, with existing conditions. These carriers will therefore be dismissed from further consideration at this time.

In addition to the Alpena and the Federal Valley, there are eight other short-line interveners. These parties will be designated as follows: Chicago, Attica & Southern Railroad Company, as the Atica; Delaware & Northern Railroad Company, represented herein by its receivers, as the Delaware; Fonda, Johnstown & Gloversville Railroad Company, as the Fonda; the Owasco River Railway, as the Owasco; Southern New York Railway, Incorporated, as the Southern; the Ulster & Delaware Railroad Company, as the Ulster; and the Casey & Kansas Railroad Company and the Kansas & Sidell Railroad Company, as the Casey and the Sidell, respectively.

Testimony of officers of the companies, and of citizens and representatives of various organizations and industries in territories served, was adduced to show facts pertaining to corporate history and status; location, mileage, connections, and physical characteristics of the lines; scope and topography of territory served, together with statistics and other information concerning population, resources, industries, commodities produced, available railroad facilities, highways, and other physical and economic conditions; relationships of the various lines to the New York Central lines; traffic, including the nature, volume, and movement of freight transported, and the volume of traffic interchanged with the New York Central lines; public need for

the service performed by the respective short lines; and the effect on communities served solely by short lines if those carriers are not strengthened or if their operation should be discontinued; benefits and economies which might be expected to flow from inclusion of the short lines in the New York Central lines; investments in properties owned by the short lines; and legislative history of the consolidation provisions of the interstate commerce act.

To this evidence the applicants responded, at the second hearing, with testimony relating, among other things, to the physical condition of the properties of the short lines; the cost of rehabilitating the properties to system standards; the relation between claimed economies and increased operating expenses due to higher wages which in some instances might follow absorption into the New York Central system and a higher standard of maintenance under [fol. 64] system operation, impending changes in properties due to various causes and involving altered conditions and additional expenditures; available highways, and motor-vehicle competition; volume, nature, and movement of traffic; routes; rates; history of various projects with special reference to financial practices; and difficulties incident to determination of any satisfactory basis for acquisition of the properties by the New York Central.

Boyne City, Gaylord & Alpena Railroad Company

The Alpena's main line extends eastward across the northern portion of the Lower Peninsula of Michigan from Boyne City, on Pine Lake, an estuary of Lake Michigan, through Moore, Gaylord, and Atlanta to Alpena, on Thunder Bay, an arm of Lake Huron, a distance of about 92 miles, with a spur from Moore to Boyne Falls, 1 mile, and other spur tracks and sidings aggregating approximately 49 miles. The lines connect at Boyne Falls with a line of the Pennsylvania Railroad system, at Gaylord with the Michigan Central's Mackinac division, and at Alpena with the main line of the Detroit & Mackinac Railroad Company, which also has a branch from Alpena westward to a point called Hillman.

The project began with the construction of 7.31 miles of track from Boyne City to Boyne Falls for logging purposes by the Boyne City & Southeastern Railroad Company, which

was organized in 1893 by stockholders of the W. A. White Company, a lumbering concern. Between 1893 and 1905 other manufacturing concerns became established at or near Boyne City. In the latter year, the railroad properties then in existence were acquired by the Alpena which built further extensions and finally completed construction to the city of Alpena in 1918.

Practical exhaustion of the timber supply is reflected in statistics of the Alpena's traffic. The ratio of the volume of forest products to tonnage transported decreased from 96.6 per cent in 1902 to 65 per cent in 1922 and to 56 per cent in 1926. In the latter year, of 70,719 tons of forest products moving over the Alpena's lines, 30,409 tons were pulpwood, a low-grade commodity moving only for short distances, and 15,461 tons were logs, posts, poles, and cordwood. Lumber and timber with which were grouped box shooks, staves, headings, amounted to less than 8,000 tons.

The total population, urban and rural, served by the Alpena is estimated at between 40,000 and 45,000. Comparative statistics for 1910 and 1920 indicate a decline in population in the decade. The populations of the five agency stations along the lines are as follows: Boyne City, 4,284; Boyne Falls, 241; Gaylord, 1701; Atlanta, 261; and Alpena, 11,101. As previously indicated, Boyne Falls, Gaylord, and [fol. 65] Alpena are served by lines of other carriers. There are good highways between Boyne City and Boyne Falls, 7.3 miles, and between Atlanta and Hillman, 15.5 miles. It is stated that Boyne City and Alpena are thriving towns with good industrial prospects. Farming is the principal industry in the remainder of the territory. In 1926, this industry furnished traffic amounting to over 15,000 tons.

While exploration has failed thus far to reveal the presence of oil in the territory, there are near Boyne City large deposits of cement rock and at various points along the line large deposits of gravel, a commodity in much demand in the large cities of southern Michigan. The attorney general of Michigan represents that the concern of the State for the territory in question is being manifested by large expenditures for roads, schools, and the assistance of agriculture.

The Alpena's traffic is chiefly interline freight. During the years 1922-26, 79 per cent of the freight originated on the lines and 21 per cent was received from connections.

The volume and character of commodities transported in this period are shown by the following tonnage analysis:

Products of—	1922	1923	1924	1925	1926
Farms	7,750	8,611	6,960	3,903	5,757
Animals	9,480	11,258	9,335	9,419	9,944
Mines	18,840	39,286	50,933	37,116	17,243
Forests	282,720	276,922	256,398	112,055	70,719
Manufactures and miscellaneous	109,500	88,703	79,742	46,002	18,266
Less-than-carload freight	5,110	5,130	4,962	4,505	2,841
	433,400	429,910	408,330	213,000	124,770

The volume of interchange with other carriers in 1926 was as follows: Detroit & Mackinac, 3,170 tons, or 3.3 per cent; Michigan Central, 47,106 tons, or 48.7 per cent; and Pennsylvania, 46,406 tons, or 48 per cent. The Michigan Central's share is said normally to be about 60 per cent.

Results of operation of the Alpena's properties from January 1, 1922, to September 30, 1927, were as follows:

	Net income from railway operations	Net income		Net income from railway operations	Net income
1922	$86,178.73	[1]$1,108.69	1925	$28,718.87	[1]64,297.59
1923	89,876.44	11,927.66	1926	4,185.94	[1]89,134.49
1924	113,200.70	[1] 1,910.59	1927 (nine months)	13,335.10	[1]43,401.48

[1] Deficit.

The losses sustained are attributed to expenses incurred for car hire and for interest. The former charge ranged from $22,861.86 in 1926 to $54,070.72 in 1923.

[fol. 66] It is contended on behalf of the Alpena that its lines provide the only railroad service at the town of Boyne City, are a guaranty of the future of a great area which has only begun to develop, and preserve competitive conditions at Boyne Falls and Alpena; that the only alternatives which the future holds for the carrier are acquisition of its properties by the New York Central or abandonment; and that the former alternative would make continued operation of the railroad economically and efficiently possible without creating an undue drain on the New York Central system. Economies possible of accomplishment through elimination of duplication in expense under system operation are estimated at $43,500 per annum. The attorney general of the State of Michigan joins in the contention that operation of the Alpena's lines is required by public convenience

and necessity, and urges that operation of the properties as a part of the New York Central lines is the only practicable solution of the carrier's difficulties. The applicants contend that the track between Boyne Falls and Boyne City could be operated by the Pennsylvania as a spur but that the remainder of the Alpena's properties should be abandoned.

On June 15, 1928, the Alpena's stockholders adopted resolutions authorizing the directors to offer to sell all the assets and properties of the corporation to the New York Central in consideration of the assumption by that carrier of the Alpena's bonds, or payment of the bonds with interest from July 1, 1928, to the date of payment, and of payment of the further sum of $277,247.92 in cash or interest-bearing notes. Upon the passing of such consideration, the Alpena would guarantee to discharge all current liabilities, etc., aggregating $539,843.58, and deliver the properties free from all liens and charges other than the lien of the mortgage securing the $800,000 of bonds.

There is testimony for the applicants that the Alpena's tracks, both steel and ties, and roadway structures are in poor condition. The estimated cost of rehabilitating the lines to system standards for a logging line of the better class is $76,471, and system operation would involve additional expense, over and above savings, amounting to $67,233, because of higher standards of maintenance, wage agreements, etc., applicable on the New York Central lines. With respect to a contention that the New York Central would receive revenues of about $80,000 per year in excess of earnings now accruing to it from traffic handled in interchange with the Alpena, it is answered that the contemplated movements would require cancellation of many routes, modification of many rates, and denial of the shippers' right to designate the routing of their freight.

The Alpena's line from Boyne City to Alpena is the only railroad which traverses lower Michigan from east to west between the northern extremity of the southern peninsula [fol. 67] to the Pere Marquette Railway Company's line between Ludington and Saginaw, a distance of 175 miles, and is also the only railroad serving Montmorency County, the eastern half of Otsego County, the southwestern part of Alpena County, and the northern half of Oscoda County.

This area is compared in the record to the combined areas of the States of Connecticut and Rhode Island.

The testimony impresses us that an important section of the State of Michigan is in a state of transition from specialized industry to a more stable condition of industrial diversification; that the line of the Alpena is strategically located to assist in, and ultimately profit from, the development of this territory; and that, in the interest of the people of Michigan, the line ought to be preserved, if possible, to the end that such development may not be unduly retarded.

Chicago, Attica & Southern Railroad Company

The Attica intervened in this proceeding to put the facts concerning its condition and circumstances before us in order that it may be determined, in connection with our consideration of the proposals of the applicants, whether the properties of the Attica should be allocated to the New York Central Lines. It is contended that the properties should be included in the proposed unified system.

The main line of the Attica extends from La Crosse, in La Porte County, southward through Wheatfield, Percy Junction, Swanington, and Veedersburg, to West Melcher, in Parke County, 120 miles, with a branch from Percy Junction, through Morocco, to a point in Newton County at or near the Indiana-Illinois State line, 20 miles, all in the State of Indiana. These lines were formerly parts of the Coal Railway division of the Chicago & Eastern Illinois Railroad, and acquisition and operation thereof by the Attica was authorized by us in November, 1922, 76 I. C. C. 169. From La Crosse northward to Wellsboro, Ind., 15 miles, the Attica has trackage rights over the Pere Marquette Railway. The Attica's lines connect with other railroads as follows: At Wheatfield and at Morocco, with lines of the New York Central; at Swanington and at Veedersburg, with lines of the Big Four; and at various points with lines of other systems, including the Pennsylvania, the Baltimore & Ohio, the Erie, and the New York, Chicago & St. Louis, or Nickel Plate.

The Attica is engaged in freight service only. Its lines traverse eight counties, passing through a rich agricultural section producing corn, wheat, and oats, and having an aggregate population of 154,407. Many farming communities

and towns are dependent upon the Attica for the transportation of outbound products and inbound fertilizer, household necessities, and other commodities. It was testified by residents of the territory that preservation of the service performed by the Attica is of vital importance to the eco- [fol. 68] nomic and social welfare of the people residing along, and in territory tributary to, the lines.

The following statement presents analyses, in the record, of traffic handled during the four years from 1923 to 1926, inclusive:

Commodities and source	1923	1924	1925	1926
Farm products:	Tons	Tons	Tons	Tons
Originated	53,711	61,256	41,614	60,256
From connections	1,398	1,998	3,644	2,914
	55,109	63,254	45,258	63,170
Animal products:				
Originated	7,860	7,840	4,774	3,430
From connections	241	520	1,396	749
	8,101	8,360	6,170	4,179
Mine products:				
Originated	15,597	29,955	6,020	.....
From connections	97,971	117,598	183,448	98,684
	113,568	147,553	189,468	98,684
Forest products:				
Originated	3,394	4,635	4,041	1,993
From connections	4,317	17,355	33,246	98,924
	7,711	21,990	37,287	100,917
Manufactures and miscellaneous:				
Originated	20,826	22,952	21,492	21,759
From connections	24,014	31,507	78,033	59,457
	44,840	54,459	99,525	81,216
Less-than-carload freight:				
Originated	944	1,280	541	261
From connections	2,574	2,170	2,364	2,270
	3,518	3,450	2,905	2,531
Total:				
Originated	102,332	127,918	78,482	87,699
From connections	130,515	171,148	302,131	262,998
	232,847	299,066	380,613	350,697

Interchange traffic handled by the Attica during 1925 and 1926 was divided among connecting lines, as follows:

	1925	1926
New York Central lines:	Tons	Tons
New York Central—		
Outbound	32,116	58,254
Inbound	21,743	7,403
Big Four—		
Outbound	15,658	10,106
Inbound	30,741	28,485
Total	100,258	104,248
B. & O. System:		
Baltimore & Ohio R. R.—		
Outbound	1,805	1,881
Inbound	146	77
Cincinnati, Indianapolis & Western R. R.—		
Outbound	12,092	5,013
Inbound	91,304	51,339
Total	105,347	58,310
Other carriers:		
Outbound	95,471	126,811
Inbound	90,637	61,328
Total	186,108	188,139
Total:		
Outbound	157,142	202,065
Inbound	234,571	148,632
Grand Total	[1]391,713	350,697

[1] Includes 11,100 tons of company coal and freight.

[fol. 69] The New York Central lines' share in the interchange traffic amounted to 25.6 per cent of the total in 1925 and 29.7 per cent in 1926.

Annual deficits sustained by the Attica amounted to $26,720.65 in 1923, $44,883.32 in 1924, and $15,603.45 in 1925. Gross freight revenues earned in 1925 amounted to $311,764.34, of which $99,448.59 was earned on traffic interchanged with the New York Central lines. Not including revenues accruing on the movement of grain eastward from Chicago, the applicant's revenues on the traffic interchanged with the Attica were $135,520.76. During the first 10 months of 1927, net income amounting to $14,010.99 was earned by the Attica, as compared with a deficit of $38,358.20 sustained in a like period of 1926.

The eastbound grain can move in transit through Chicago only over the New York Central lines because of backhauls involved in movements over the lines of other connections. It is estimated that the Attica receives 17 per cent and the New York Central lines receive 83 per cent of revenues earned on these through shipments.

The record also contains an analysis of the carload traffic handled by the Attica in 1927, to the following effect:

Commodities	Billing					
		Interline				
	Local	Received	Forwarded	Rebilled at junctions	Overhead	Total
Products of—						
Agriculture	270	83	1,248	9	158	1,768
Animals	263	93	409	9	2	776
Mines	8	1,393	.....	1,049	52	2,502
Forests	15	91	31	13	3,610	3,760
Manufactures and miscellaneous	183	804	732	467	3,526	5,712
Total	739	2,464	2,420	1,547	7,348	14,518

From this statement it appears that in the year mentioned products of agriculture and animals moving over the Attica's lines amounted to 2,544 cars, or 17.5 per cent of the total. The movement of cars received from one connecting line and delivered to another aggregate 7,348 cars, or 50.6 per cent. The applicants adduced testimony intended to show that much of this movement involved wasteful transportation. It is contended that of 776 cars interchanged between the Attica and the Big Four in the first 11 months of 1927, the movement via the Attica's lines represented wasteful routing in the case of 702 cars and bad routing in the case of 13 cars. Of 664 cars of oil from Lawrenceville, Ill., on the Big Four's Cairo division, many could have reached destination via the New York Central [fol. 70] lines. The applicants urge that many shipments of overhead or bridge traffic moving via the Attica's lines are hauled over circuitous routes and that this practice is stimulated by compensation of off-line agents upon a commission basis. Objectionable as this practice may be, the effort has doubtless been to keep the lines in operation. The application of another remedy should serve to correct the situation.

Public interest in the preservation of the Attica's facilities and service is reflected in the fact that in 1922 contributions, public and private, amounting to $241,700 were made in aid of the new carrier's project, and the further fact that assessment of the properties has been substantially reduced by State taxation authorities.

The applicants further contend that the Attica's properties would be of no value to the New York Central as a

secondary line as there are already in the territory system lines with more favorable grades and facilities and more frequent train service, which afford better routes for through traffic. This contention takes no heed of the necessities of that part of the public immediately dependent upon the service performed by the Attica.

We have given consideration to further contentions of the applicants that the Attica's properties are in poor physical condition; that rehabilitation necessary to restore the lines to system standards is estimated to cost $1,156,400; and that under unified operation of the lines by the New York Central, additional annual expense of $251,571 would be incurred on account of higher standards of maintenance, the application of standard wages, etc. Yet we are persuaded that the lines are apparently incapable of successful independent operation, that the interests of the people of an important agricultural section of Indiana require that the service performed over the lines be preserved, if possible, and that the flow of traffic indicates that the lines are a natural and logical adjunct of the unified system proposed by the applicants.

Casey & Kansas Railroad Company and Kansas & Sidell Railroad Company

The Casey and the Sidell, incorporated in 1919, are under common control. They operate railroads, parts of properties formerly owned successively by a number of predecessor companies dating back to a period prior to 1879, which connect and form a continuous north-and-south line in eastern Illinois from Sidell, through points called Hume, Brocton, Barton, Kansas, Westfield, and Casey, to South Casey, a distance of 45.72 miles. The Sidell owns that part of the line between Sidell and Kansas, 26.19 miles, and the Casey operates the part between Kansas and South Casey, 19.53 [fol. 71] miles. The continuous line connects at Sidell with the Chicago & Eastern Illinois Railroad and is intersected at Hume by the Baltimore & Ohio Railroad, at Brocton by the New York, Chicago & St. Louis Railroad, at Barton, by a line of the Pennsylvania, at Kansas by a line of the Big Four, and at Casey by a second line of the Pennsylvania.

The territory tributary to the line is estimated to extend on either side for distances of from 10 to 20 miles and to

have a population of approximately 40 persons per square mile. Westfield, with a population of about 1,000, is the largest community along the line. The territory traversed is an agricultural section producing grain and livestock. At points exclusively served there are six grain elevators, having an aggregate capacity of about 740,000 bushels. About 60 per cent of the grain produced in the territory is marketed, the remainder being used for feeding purposes. Livestock shipments originating on the line total about 1,000 cars a year. The animals move largely to markets at Indianapolis, Chicago, and St. Louis. A great deal of the grain is routed over the Big Four's line. Highways in the territory are chiefly dirt roads.

Passenger traffic over the lines in question is negligible. Substantially all the freight traffic is handled in interchange with other carriers. Tonnage statistics show substantial decreases in recent years in the volume of traffic moving over the line. In 1927, traffic was interchanged with connecting trunk lines and between the Casey and the Sidell, as follows:

	Tons
Casey:	
Big Four	7,337
Pennsylvania	31,682
Sidell	14,352
Total	53,371
Sidell:	
Big Four	18,195
Baltimore & Ohio	32,977
Chicago & Eastern Illinois	7,398
New York, Chicago & St. Louis	3,686
Pennsylvania	2,467
Casey	288
Total	65,011
Total	118,382

Combined operating revenues declined from $115,471 in 1922 to $71,955 in 1926. Balance sheets of the two companies as of December 31, 1927, show corporate deficits aggregating $81,569.43.

On behalf of these interveners it is urged, in the interests of the consuming public in general and of the inhabitants of [fol. 72] the territory served, that the railroads be taken over by the New York Central under some plan which would be equitable both to the applicants and to the present owners. The applicants reply that analyses of the traffic of

the railroads disclose no basis for allocation of the properties of the Casey and the Sidell to the New York Central Lines. In this contention we concur.

Delaware & Northern Railroad Company

The line of the Delaware extends from a connection at Arkville with the main line of the Ulster to a connection with the New York, Ontario & Western Railroad at East Branch, N. Y., a distance of 37.52 miles. This line is said to traverse four townships having an aggregate population of 12,845, and to provide the only railroad service in that territory except at the junction points. The Delaware's properties have been in receivership since March 25, 1921.

The territory served is largely agricultural, and includes one of the richest dairying sections in the State of New York, but the territory also has numerous other industries. While the dairy and agricultural products move principally to New York City over the lines of the Delaware, the Ulster, and the New York Central, other shippers find it more advantageous to route their products via East Branch over the New York, Ontario & Western due to a more favorable rate situation. The receivers now obtain a large amount of such traffic, on which they enjoy the maximum haul. If the rates over the lines of the Ulster and the New York Central should be reduced so as to be equally advantageous as the through rates now existing over the New York, Ontario & Western's lines, the receivers fear they would lose the greater part of this valuable traffic because of shorter distances via the former route.

The receivers intervened herein because they apprehended that the New York Central might acquire the properties of the Ulster without also acquiring the Delaware's line. Since the line does not now connect with the New York Central system, and such connection would be effected only through occurrence of the contingency mentioned, we deem it appropriate that the case of the Delaware be dismissed from further consideration unless and until the matter of unification of the Ulster's properties with the system proposed by the applicants approaches consummation.

Federal Valley Railroad Company

The Federal Valley owns and operates in the State of Ohio a line of railroad extending from a connection with a

line of the New York Central at Palos, in Athens County, in a southerly direction across the southeastern corner of [fol. 73] Morgan County, to Lathrop, in Athens County, Ohio, a distance of approximately 16 miles.

The line of the Federal Valley traverses a fertile valley surrounded by high hills. There are four coal mines along the line and the territory contains important deposits of bituminous coal, limestone, and shale. No other railroad enters this territory. Highways do not afford adequate means for the transportation of commodities produced and consumed in the valley, and the cost of trucking would be prohibitive. The population dependent upon the service performed by the line of the Federal Valley is estimated at 10,000. Abandonment of the line would seriously affect industries and investments of these people.

Practically all of the Federal Valley's traffic is handled in interchange with the New York Central. From the beginning of operations on February 1, 1918, to January 1, 1926, coal traffic originating on the Federal Valley's line averaged over 90,000 tons per annum. During 1926, only 5,742 tons of coal were shipped. Effort is being made to overcome the subnormal condition of the coal industry in Ohio. With the resumption of normal operations, coal deposits reached by the Federal Valley will furnish a large and dependable tonnage on which the New York Central will receive the long haul. The volume of freight traffic, other than coal, handled over the line increased from 3,092 tons in 1923, to 11,128 tons in 1925, and to 33,619 tons in 1926.

Income accounts of the Federal Valley between January 1, 1921, and December 31, 1925, show that deficits were sustained each year. These annual deficits ranged from $33,895.35 to $52,565.84, with amounts somewhat less than the maximum in years subsequent to 1923. For 10 months of 1926, the deficit was $38,907.22.

With the exception of a few hundred feet, the line of the Federal Valley is laid with 56-pound rails, which have been in place for many years and are in bad condition. Cuts and fills are narrow. While the general condition of bridges is good, a majority of them are not sufficiently strong to carry 70-ton cars and the type of locomotive used by the New York Central in adjacent coal fields. Two tunnels limit the size of box cars capable of being moved over the line.

The cost of rehabilitating the line to New York Central branch-line standards is estimated at $150,790. The estimated annual expense of maintenance as a system branch is $37,500. Operating expenses would be substantially increased. The Federal Valley is not on the standard scale of wages and working conditions are different from those obtaining on the New York Central. The applicants contend that if the line is to be continued in operation at all, it would be more economical and more in the public interest that it be operated under local management as at present.

[fol. 74] We have heretofore given consideration to the importance to the public of the service afforded by the Federal Valley, and observed that many farmers and business men would be seriously inconvenienced if the line were abandoned. 89 I. C. C. 489. Since the line connects and interchanges traffic only with the New York Central lines, there can be no question as to its physical affiliation with the proposed system.

Fonda, Johnstown & Gloversville Railroad Company

The railroads operated by the Fonda consist of lines aggregating 88.77 miles, all in the State of New York, as follows: (1) A single-track line from Fonda, through Johnstown, Gloversville, and Broadalbin Junction, to Northville, approximately 25.5 miles; (2) a branch from Broadalbin Junction to Broadalbin, 6.15 miles; (3) a double-track line from Gloversville, through Johnstown, to a point called Upper Crossing, thence along the north bank of the Mohawk River and through Fort Johnson and Amsterdam, to Schenectady, approximately 32.5 miles; (4) a single-track line from Gloversville to Fonda, about 8.75 miles; (5) a line from Gloversville to Johnstown, approximately 4 miles; (6) street railways in the cities of Gloversville, Johnstown, and Amsterdam; and (7) a single-track line from Amsterdam to Hagaman, about 2.25 miles. The lines described in brackets (2) and (5) are operated under lease. Electric power is used in the operation of all the lines except those described in brackets (1) and (2). Lines of the Fonda connect with the New York Central lines at Fonda and Fort Johnson, and with the Schenectady Railway at Schenectady. The lines do not physically connect with any other railroads.

Lines of the Fonda afford the only railroad facilities serving Fulton County and a substantial portion of the southern part of Hamilton County, N. Y. Fulton County is about 516 square miles in area and has approximately 46,000 people. Most of the leather gloves manufactured in the United States are made in Fulton County, and other important industries conducted in that territory include tanneries and silk textile factories. There are 377 manufacturing plants located at points along the Northville-Fonda line. In 1926, the assessed value of real estate in Fulton County was $52,753,000. The portion of Hamilton County served by the Fonda is largely a region of summer resorts.

During the 6-year period from 1921 to 1926, inclusive, the Fonda carried 1,635,001 tons of revenue freight, of which 1,557,976 tons, or about 95 per cent, were interchanged with the New York Central at Fonda. It appears that the volume of interline passenger traffic handled in connection with the [fol. 75] New York Central is substantial, and practically all mail and express carried by the Fonda is interchanged with that carrier.

Net income was earned in each of the years 1921 to 1926, but declined in amount steadily since 1923. During the first 11 months of 1927, a deficit of $38,406 was sustained.

It is contended on behalf of the Fonda that its lines must be included in the applicants' system in order to preserve and maintain the properties in a healthy condition to serve the territory involved. Practically the entire segment of line between Broadalbin Junction and Northville is included in properties condemned for the location of a power project. The applicants concede that the Fonda's steam railroads are a logical affiliation of the New York Central and state that, if it were possible to segregate these lines, excluding the part north of Broadalbin Junction, from the Fonda's electric railways and noncarrier properties and to determine the terms and conditions upon which they should be acquired, the New York Central would be prepared to provide for their inclusion in its system.

Owasco River Railway

The Owasco began operation in 1881. It is engaged exclusively in switching service in the city of Auburn, N. Y., and operates over a total of 3.258 miles of track, consisting

of 2.441 miles of main line and 0.817 mile of yard tracks and sidings. The main line is formed by the inclusion of (1) a leased track extending from a connection at York Street with the Lehigh Valley Railroad, through the plant of the International Harvester Company, to and beyond a connection with the New York Central Railroad at Pulsifer Street, (2) that part between Pulsifer and Garden Streets of the New York Central's line, over which the Owasco has trackage rights, and (3) an owned line, excepting 977 feet, which part is leased, extending from the connection with the New York Central's line at Garden Street to a point near the intersection of Lincoln and Canal Streets, hereinafter referred to as the southern segment. The right to operate over the New York Central's track has been in effect since 1887. The existing trackage agreement is not limited as to term, but may be terminated by either party upon 30 days' notice. The Owasco operates as an independent common carrier, but is controlled by the International Harvester Company, which is the largest shipper on the road.

Auburn has 62 industries, of which 16 are served exclusively by the Owasco. Distances from industrial plants served by the Owasco to points of interchange with the trunk lines range from 0.5 mile to 1.3 miles in the case of the New York Central and from 1.5 to 2.1 miles in the case of the Lehigh Valley. A witness testifying on behalf of industries served by the Owasco, but not affiliated therewith, stated [fol. 76] that if the shippers were assured of continued operation of the line, they would not be concerned whether the Owasco's properties are acquired by the New York Central or by some other carrier, but that cessation of operation would seriously affect the industries, possibly to the extent of necessitating the removal of their plants to other sites or other cities. Of the 16 plants exclusively served, 13 are on or adjacent to the southern segment, 2 are adjacent to the segment operated under trackage rights, and only 1, a plant of the proprietary company, is reached by the segment between York and Pulsifer Streets.

During the period 1921-1926, the Owasco handled 30,653 revenue cars, or an average of 5,109 cars per annum. Of 5,417 revenue cars switched in 1926, 4,601 cars, or 84.9 per cent, were line-haul cars, to or from points beyond Auburn, handled in terminal switching service. The following table

is indicative of the interchange between the Owasco and the respective connecting trunk lines:

	New York Central		Lehigh Valley	
	Cars	Per cent	Cars	Per cent
1926	3,068	[1] 66.7	1,533	33.3
1927	2,776	62.5	1,665	37.5

[1] 74.1 per cent of the total tonnage.

The Owasco has suffered deficits amounting to $352.22 in 1923, $3,944.29 in 1924, $983.40 in 1925, and $888.72 in 1926. There was also a deficit in 1927. The rates received by the Owasco ranged from $3.15 to $8.10 per car according to the nature of the service performed. It is contended that the Owasco can not be successfully operated unless relief can be secured through increased divisions or through acquisition and operation of its properties by the New York Central.

Counsel for the Owasco has outlined various types of orders which, it is contended, we are authorized to enter so as to protect the short lines and the public dependent upon them. It is counsel's opinion that an order requiring acquisition of essential short lines in most equitable and harmonious with the spirit of the transportation act, 1920, but, in the event that this action is declined, it is requested that we enter a conditional order similar to that in Control of Gulf & Ship Island R. R., 99 I. C. C. 169, 173, 175, and that we protect the Owasco in the matter of through routes and joint rates and divisions. The applicants contend that the real grievance of the Owasco is that it does not receive allowances regarded by it to be sufficient, and that this position relegates the intervention of this party to a divisions controversy.

[fol. 77] Southern New York Railway, Incorporated

The Southern, which is controlled by the Mohawk Limestone Company, owns, and operates by electricity, a single-track line extending from Mohawk, through Richfield Springs and Index, to Oneonta, 55 miles, with a branch line from Index to Cooperstown, 3 miles, all in the State of New York; and also operates under trackage rights over lines of the New York State Railways, from Mohawk to Utica and from Mohawk to Herkimer. The main line connects at Mohawk, as previously indicated, with lines of the New York

State Railways and, by means of tracks of that company, with a line of the New York Central, at Richfield Springs with a branch line of the Delaware, Lackawanna & Western Railroad Company, and at Oneonta with a line of the Delaware & Hudson Company. The New York State Railways operates electric railways and is controlled by the New York Central.

The territory traversed by the Southern's lines is primarily a farming section in which dairying is the principal industry, but where sheep raising and poultry farming are also extensively conducted. The population of communities along the lines is about 72,700, with approximately 50,000 more in tributary territory. Twelve communities are served exclusively by the Southern. Witnesses testified that continued operation of the Southern's properties is of vital interest to the people of the territory served.

While the Southern carried 100,000 passengers in 1926, its passenger traffic has been affected by motor-vehicle competition and by abandonment of street-railway service formerly performed in the city of Oneonta. In 1923, the Southern carried but 52,350 tons of freight; in 11 months of 1927, the freight traffic over the lines had grown to 165,301 tons. A large part of the increase appears to be due to the development of affiliated industries at points along the lines. Thus, in 1927, products of mines comprised 3,364 cars, or 74 per cent of the carload traffic handled by the Southern. The division of the 1927 freight traffic according to interchange with connections was as follows:

	Forwarded Cars	Received Cars	Total Cars
Delaware & Hudson	1,225	662	1,887
Delaware, Lackawanna & Western	545	294	839
New York Central	34	68	102
	1,804	1,024	2,828
Local	.....	.....	1,733
Total	.....	.....	4,561

[fol. 78] Joint rates with the New York Central have recently been established, but that carrier does not expect any substantial increase in the share of the interchange traffic obtained by it, due to the location of industries and operating conditions.

The Southern's operating ratios have been high, ranging from 114.70 per cent in 1923 to 150.38 per cent in 1926, but

falling to 109.24 per cent in 11 months of 1927. On November 30, 1927, the accumulated debit to profit and loss was $636,683.89.

A witness for the Southern expressed the opinion that it would be practicable for the properties of that carrier to be operated by the New York State Railways. The applicants contend that, in so far as it is a carrier of freight, the affiliation of the Southern is clearly much greater with the other trunk lines than with the New York Central, and point out that the New York State Railways is a separate and distinct corporation.

The Southern is not antagonistic, but friendly, to the New York Central, and has intervened in this proceeding in order that its status may be determined in connection with the first general plan of unification presented by any of the carriers with the lines of which the Southern's lines connect. The indicated flow of traffic does not impress us that the line of the Southern should be considered primarily a feeder of the New York Central Lines.

Ulster & Delaware Railroad Company

The Ulster owns and operates a main line extending from Kingston, through Phoenicia and Arkville, to Oneonta, 106 miles, with branches from Phoenicia, through Kaaterskill Junction, to Kaaterskill, 19.2 miles, and from Kaaterskill Junction to Hunter, 2.7 miles, all in the State of New York. The main line connects at Kingston with lines of the New York Central and the New York, Ontario & Western Railway Company, at Arkville with the line of the Delaware, and at Oneonta with a line of the Delaware & Hudson Company. The eastern part of the territory is mountainous and largely given over to summer resorts. The western part also has summer resorts and is a highly developed dairying section. Investments in hotels, dairy farms, and creameries dependent upon the Ulster's service are estimated at more than $20,750,000.

Traffic statistics show that during 1925 the Ulster carried 193,028 passengers, 423,235 tons of freight, and 990,608 40-quart cans of milk, and earned $85,788.23 from the transportation of mail and express. Of this traffic, 97,844 passengers, 117,777 tons of freight, all the milk, and a large percentage of the mail and express were handled in interchange

[fol. 79] with the New York Central. Annual gross revenues accruing to that carrier from all traffic interchanged with the Ulster are estimated at not less than $750,000.

Operation of its properties by the Ulster resulted in net incomes of $15,795.61 and $11,124.82 in 1923 and 1924, respectively, but deficits of $94,981, $111,696, and $112,802 were sustained in 1925, 1926, and for nine months of 1927, respectively. The volume of freight transported declined from 586,152 tons in 1923 to 394,408 in 1926. In the latter year, passenger revenues amounted to only 57 per cent of similar earnings in 1922.

Pertinent testimony adduced on behalf of the applicants is to the effect that in 1925 the shipments of anthracite coal over the Ulster's lines amounted to 292,852 tons, or 69 per cent of the total freight traffic, and contributed more than 50 per cent of the entire gross revenues from all traffic over the lines. This coal originates on the Delaware & Hudson system. Other routes, superior in point of distance and grades, are available for the movement of this traffic except for a relatively small proportion destined to points local to the Ulster's lines. The applicants contend that use of the line of the Ulster in road-haul service for a large part of the coal is unnecessary, but, that, if it be concluded that the anthracite coal can not be handled otherwise than by use of that line, then it follows that the affiliation of the Ulster with the Delaware & Hudson Company is closer than with the New York Central.

We are persuaded that, regardless of the coal movement, the Ulster's line is clearly supplementary to and operated in connection with the New York Central to a very considerable extent.

Public Interest

The applicants contend that control of the lessor lines under lease, as proposed, would be in the public interest because the proposed leases are a natural step in the evolution of the New York Central lines and because of advantages expected or hoped to accompany unified operation. On behalf of the short lines it is replied that the applicants made no material showing in the record of public gain to result from their proposals, but presented testimony, hedged about with qualifications, as to possible incidental opportu-

nities for internal economies which might be expected to follow in any case, and have entirely ignored major considerations with which the public is primarily concerned. Thus, it is contended, the applicants have failed to sustain the burden of proof.

Provisions of the interstate commerce act pertaining to acquisitions of control and to the consolidation of the railroads of the United States into a limited number of systems were enacted as section 407 of the transportation act, 1920. From the legislative history of the statute it is ar- [fol. 80] gued on behalf of the short lines that consolidation was the real aim of Congress and that when it undertook to relieve carriers from the operation of antitrust laws, etc., as provided in paragraph (8) of section 5, Congress did not intend merely to exempt large and strong systems from the limitations of prior policy, but, on the contrary, intended to bring about combinations of weak and strong railroads of the country, and decisions of the Supreme Court are cited in support of the proposition that a fundamental purpose of the act is to preserve and maintain weak railroads which are reasonably necessary in the public interest. It is urged that the provisions of paragraph (2) of section 5 were enacted to permit combination or unification of lines, in ways not involving consolidation, in the interim between the effective date of the statute and the time when conditions precedent, prescribed by paragraphs (4) and (5), shall be fulfilled, and attention is directed to doubt as to proper interpretation of the limitation "not involving the consolidation of such carriers into a single system for ownership and operation," imposed upon our power to approve and authorize acquisitions of control.

The short lines point out that the applicants are seeking to take an important step in the direction of complete consolidation of the properties which it now controls, and that the only remaining step necessary to be taken is one which would change at most only the legal and technical status of the companies. The New York Central system would be so thoroughly integrated, the unification of the lines would be so complete, it is contended, that little incentive would remain for the taking of further steps and, under the present state of the law, no means are provided to compel the applicants to consolidate or to propose consolidation.

Since this proceeding relates merely to the lease of properties which are already part of the New York Central lines, and does not involve the building up of a large system, the applicants contend that this is not an appropriate occasion for considering the inclusion of any so-called short-line railroads. On brief, but nowhere in the testimony, it is stated that when appropriate occasion arises for the consideration of these questions, they will be approached by the New York Central in a spirit of cooperation looking to their proper solution with all due regard to the public interest. But, the short lines reply, the distinction is one of degree and not of principle, and there is no suggestion in the terms of the statute of any distinction of the kind claimed by the applicants. The Ohio interests apprehend that the appropriate occasion for considering the question of including short lines may not arise for 99 years.

The short lines ask that the pending applications be denied, or if the authority sought is granted, that conditions be imposed requiring the applicants to make provision for [fol. 81] the inco oration in the unified system, upon reasonable terms, of short lines party hereto. Two of these interveners suggest, as a third alternative, that the record be held open for a reasonable length of time to afford the applicants opportunity to amend their applications so as to provide for the inclusion of appropriate short-line railroads. As an alternative in the case of the Owasco, it is requested that we enter a conditional order similar to that in Control of Gulf & Ship Island R. R., supra.

The applicants, on the other hand, ask that the short-line interventions be dismissed upon one or more of the following grounds: That interventions not for the purpose of preventing adoption of the plan, but for the purpose of requiring further extension of the plan, are not permissible under the provisions of paragraph (2) of section 5, that we may not condition our approval herein upon the making or offering to make acquisitions of control other and different than those proposed by the applicants; that the short lines have failed to produce adequate data upon which we may find that the public interest requires allocation of their lines to the New York Central system; and that the interveners have failed to furnish adequate data upon which we may prescribe terms and conditions upon which their lines should be included in the proposed unification plan.

If these findings are refused as to any short line, and we find that such intervener's properties should be included in the unified system, then the applicants ask that we prescribe the terms and conditions upon which the properties should be included.

Terms and Conditions

The minority stockholders contend that rentals reserved to them are inadequate, and that other provisions of the proposed leases are likewise inadequate to protect the rights of the lessor companies.

Among reasons assigned in support of their contentions, the minority stockholders state that, as the majority stockholder, the New York Central is a fiduciary for the minority and must show, with all doubts resolved in favor of the minority, that the transaction is fair; that the value of the leased premises is an element to be considered, especially in the case of railroad leases, because under authority conferred by Congress we have determined what, under all of the circumstances, is a fair return upon railroad properties; that under the provisions of section 8809 and 8813 of the General Code of Ohio, rentals reserved for leased railroads situate wholly or in part within that State shall be equal at least to net earnings of the leased railroad for the fiscal year next preceding the one in which the lease is made, and that no company shall lease its road unless the lessor receives full and adequate security for the payment of the rental and for the preservation of its property; that [fol. 82] evidence as to what the market price of stocks of the lessors should be is incompetent, since responsible officers of the New York Central did not testify how the matter of rentals was determined; that our records contain no example of any lease of a substantial railroad where the rental reserved bears so low a relation to earnings as in the present case; that provisions of the leases for arbitration of the value of stocks and purchase of minority interests are burdensome, afford no real protection, and are further objectionable because it is not the business of the directors of a corporation to force stockholders to sell their stock; that the only possible way to determine fair rentals, namely, by negotiation at arm's length, was not attempted, nor were minority stockholders consulted or

any independent judgment sought in the matter; that provisions concerning the issue of securities by the lessor companies are oppressive and improper because these companies are dominated by the ultimate lessee; and that, for similar reasons, provisions for remedies upon default and for arbitration of disputes between parties to the leases are either unenforceable or of no real value. It is urged that the terms of the leases are more favorable to the New York Central than to the lessors because the former is to receive as its own property all net earnings derived from operation of the lessor lines, including any augmentation of net earnings from savings which may be effected.

The applicants have replied that the quasi-trust relationship of the majority stockholders to the minority does not disqualify the majority from dealings with the corporation from which profit or advantage would be derived, but that in view of the dominant position of the New York Central, it is proper that the proposed transactions be scrutinized for entire good faith and fairness of terms. As for advantage expected to accrue to the New York Central, as lessee, the applicants cite language in our decision in Lease of L. & N. E. R. R., 124 I. C. C. 81, to the effect that the surrender to the owners of leased property of financial benefit which the consolidation plan contemplates should accrue to the carriers for the benefit of the public through reduced rates and improved service, would impose upon the carriers too heavy a burden of fixed charges. With respect to values of properties proposed to be leased, the applicants point out that there has been no final valuation of the properties, and contend that the figures in protests of the carriers should not be used to test reasonableness of the rentals; further, that the provisions of section 15a afford no assurance as to the return which will be realized by the properties. The applicants urge that in the exercise of sound judgment in determining rentals under the leases practical constructive guides were in demand, and that it was considered that a proper solution of the problem would be [fol. 83] aided by consideration of normal or average relationships between net income and market value. In long-term commitments, they assert, consideration should not be confined to current conditions in total disregard of uncertainties of the future, and the use of recent net income as the basis of the computations is considered to be very

favorable to the minority. Concerning the provisions of the Ohio statutes the applicants point to paragraph (8) of section 5, providing for relief from the operation of anti-trust laws and all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable carriers to do anything authorized by any order made by us under and pursuant to preceding provisions of section 5, and cite cases in which we have — that State statutes were inapplicable. In reply to objections of the minority to other provisions of the proposed leases, the applicants direct attention to the New York Central's willingness, expressed at the hearing, that language with respect to which the minority entertain doubt or apprehension be altered or amended to the satisfaction of the minority.

Tests of Provisions for Minority Stockholders

In support of their contention that the terms of the leases are reasonable and just to the minority stockholders, the applicants adduced testimony as to the studies made on that behalf. In March, 1926, there was prepared a statement showing the relation of net earnings to the average market price for the years 1924 and 1925, of the stocks of certain major carriers,[1] for the purpose of determining how earnings were reflected in market price over a period of time. In these computations, the New York Central, the Michigan Central, the Big Four, and the Pittsburgh & Lake Erie, also a subsidiary of the New York Central, were first included in, and then excluded from, the list of carriers to which reference was had. Applying composite ratios thus ascertained to net income per share earned by the Michigan Central and the Big Four in 1925, the following market values were reflected for the stocks of those companies:

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[1]Atchison, Topeka & Santa Fe Railway Company, Atlantic Coast Line Railroad Company, Chesapeake & Ohio Railway Company, Illinois Central Railroad Company, Louisville & Nashville Railroad Company, Lehigh Valley Railroad Company, Nashville, Chattanooga & St. Louis Railway, Norfolk & Western Railway Company, Reading Company, Southern Railway Company, Union Pacific Railroad Company, New York Central, Big Four, Michigan Central, and Pittsburgh & Lake Erie Railroad Company.

Stock	Market value per share	
	Including New York Central lines	Excluding New York Central lines
Big Four, common	$182.60	$177.00
Michigan Central	790.00	766.00

[fol. 84] Using similar data for nine major carriers,[1] including the New York Central, for the years 1915 to 1925, inclusive, it was calculated, in a memorandum dated June 11, 1926, that the earnings were 11 per cent of the average market price of all the stocks for the 11-year period, from which it was inferred that stock earning 11 per cent had a market value of par. On this basis the value reflected for the stocks of the three companies not wholly controlled would be as follows:

	1924	1925	1926	[1] 1927
Big Four, common	$146	$210	$211	$152
Michigan Central	661	912	920	816
Cincinnati Northern	259	292	298	231

[1] Net income estimated as explained above.

In preparation for the hearing, further calculations were made of the ratios borne by earnings to market prices of stocks of 10 standard railroads,[2] including the New York Central, in the years 1924 and 1925. Application of composite ratios ascertained for these roads as a whole to net earnings per share of the Michigan Central, Big Four, and Cincinnati Northern, produced the following results:

Stock	Market value per share		
	1924	1925	1924–25
Big Four, common	$136	$194	$164
Michigan Central	618	845	726
Cincinnati Northern	242	270	251

[1] Atchison, Topeka & Santa Fe, Illinois Central, Union Pacific, New York Central, Pennsylvania Railroad Company, Baltimore & Ohio Railroad Company, Lehigh Valley, Southern Pacific Company, and Northern Pacific Railway Company.

[2] Atchison, Topeka & Santa Fe, Atlantic Coast Line, Illinois Central, Louisville & Nashville, Norfolk & Western, Union Pacific, New York Central, Pennsylvania, Baltimore & Ohio, and Southern Pacific.

A witness for the applicants considered the rental fixed in the proposed lease of Big Four properties as of distinct benefit to the minority stock. The market value of such stock would respond to the rental to be paid by the lessee. It is claimed that the rental would probably give the Big Four stock a value it would not otherwise have.

It was testified that as a rule, under conditions prevailing in 1924 and 1925, as well as at the time of the first hearing, a guaranteed stock had a market value yielding 5 per cent or better, that is to say, a stock having a guaranteed return of 5 per cent sold on the market at par. In examples cited, of which four out of five — cases of carriers whose properties are leased to the New York Central or subsidiary companies, the bases of yield ranged from 4.71 to 5 per cent. It is thought that the 10 per cent rental for the Big Four would reflect a market value of $200 per share of that company's common stock, on a 5 per cent basis, and ap- [fol. 85] proximately $213 per share on a basis of 4.75 per cent.

As a result of falling interest rates, at the end of 1927 the yield basis of the guaranteed stocks included in the examples had declined so that the range was from 4.26 to 4.80 per cent, or an average yield of approximately 4.5 per cent. Stock values reflected by consideration of the proposed rentals on a 4.5 per cent basis are computed as follows: Big Four, common, $222; Michigan Central, $1,111; and Cincinnati Northern $267. Counsel for the securities corporation contends that the average yield of 4.5 per cent is not more stable than the 4.75 per cent basis initially used, for the reason that a much lower average must be reached before a normal situation is established in this regard. The protective committee contends that the market value of the stock is not relevant to the question of fair rentals under the leases.

It was the view of the applicants' witness that where railroad earnings are not distributed as dividends but are put back into the property, the value of the property, and, as a rule, the return therefrom, are increased, but he conceded that undue withholding of dividends may tend to depress the market value of stock, and great fluctuations have nothing to do with the intrinsic value of the properties may occur in common-stock values.

It is stated that the proponents of the leases intended that the terms be fair and, in the effort to be fair from all angles of the situation, made provisions in the leases that minority stockholders may have their shares valued, and purchased by the lessee at the price determined by arbitrators. In such valuation the effect of the leases is to be considered or disregarded at the option of the stockholder.

The proposed leases provide that if the lessee and any stockholder electing to sell his shares to the lessee are unable to agree as to the fair value of the stock, such value is to be determined by three appraisers to be chosen by or on behalf of "said parties" pursuant to procedure provided in the leases for the appointment of arbitrators. The latter are to be chosen one by each of the "parties hereto" and one by the two so chosen. After hearing both parties to the controversy, and taking such testimony and making such further investigations as they may deem necessary, the arbitrators are to make an award in writing. It is further provided that the fees and expenses for appraisement of the stock shall be paid by the lessee.

The protective committee is apprehensive lest the arbitrators be appointed by the parties to the leases, in which case the selection of the arbitrators would be controlled by the New York Central. The applicants state that it seems [fol. 86] inconceivable that the language of the provisions could be construed in such wise as to deprive the stockholder of an arbitrator of his own selection. We think the words "said parties," first above quoted, clearly refer to the parties to controversies concerning the value of the stocks involved and not to the parties to the leases.

In October, 1926, an investment banker was requested to review the terms of the leases. Testifying on behalf of the applicants, the banker stated that, in general, the terms of a lease should be regarded fair and reasonable if the stockholders of the lessor are guaranteed a fixed annual income equal to that which they would receive by way of dividends and if the rental is sufficient to cover reasonable dividend payments which the earning capacity of the lessor would justify. Considering abnormal conditions prevailing from 1918 to 1921, earnings in the favorable period from 1923 to 1926, dividend policies of 12 carriers,[1] including the Big Four

[1] Ten carriers listed in footnote 2 [page 77], and Big Four and Michigan Central.

and the Michigan Central, margins of earnings over dividends, the elimination of risk to the stockholders, certain special factors and conditions affecting or which may affect the traffic of the Big Four and the Michigan Central, and financial policies observed by the lessors, the witness expressed the opinion that the rentals provided by the leases are just and reasonable to the stockholders of the Michigan Central and the Big Four and, in view of the risks involved, as high as the New York Central could reasonably be expected to guarantee. In response to the inquiry whether he had considered the fact that the New York Central's risk from the leases is almost negligible because the amount of money payable as rentals is confined only to the minority stockholders, the witness stated that he had not distinguished between the majority and the minority in considering the fairness of the leases.

Evidence as to the reasonableness of the terms of the leases from the viewpoint of the public interest is to the effect that various circumstances, including the large corporate surplus, represented to a large extent in the properties, have contributed in justifying a rental as high as $50 per share in the case of the Michigan Central, and generally, that in view of the preponderance of New York Central interests in the various stocks, the aggregate amount of rentals actually to be paid as returns on minority shares is comparatively small and would have no appreciable effect on the credit of the ultimate lessee. Waiver by the lessees of the right to participate as stockholders in rentals under the leases has been mentioned. Maximum amounts payable [fol. 87] annually while shares of stock remain outstanding in the hands of minority holders as at present would be as follows:

Stock	Number of shares involved	Dividend rate or rental	Amount payable as rental
		Per cent	
Big Four, preferred	15,304	5	$76,520
Big Four, common	40,876	10	408,760
Michigan Central	1,523	50	76,150
Cincinnati Northern	684	12	8,208
	.....	..	[1] 569,638

[1] This amount does not include any sums payable to the Guaranty Trust Company of New York, trustee under the collateral-trust indenture of Apr. 13, 1898.

Including estimates of income for 1927, and using adjusted figures, where available, claimed by the minority, averages of

amounts earned per share during the 6-year period 1922-1927 may be compared with annual rentals reserved to minority stockholders under the proposed leases as follows:

Stock	Average net earnings per share	Rental per share	Ratio of rental to earnings
			Per cent
Big Four, common	$19.86	$10	50
Michigan Central	85.78	50	58

In this connection the minority cite matters, involving railroad leases, heretofore considered by us, for the purpose of comparing ratios of rentals there reserved to earnings of the lessor companies concerned.

The minority refer to our tentative valuations of the properties of the Big Four and of the Michigan Central and to values claimed in protests filed by those carriers. These interveners then undertake to adjust such tentative valuations for changes subsequent to the valuation dates, etc., with results as follows:

	Tentative valuation	Value claimed in protest
Big Four:		
July 1, 1915	$164,163,042	$315,782,433
Nov. 30, 1926 [1]	257,879,413	408,719,773
Michigan Central:		
June 30, 1918	.....	399,344,283
Apr. 30, 1926 [1]	.....	428,917,602

[1] As adjusted by interveners.

The protective committee contends that net railway operating income equal to 5.75 per cent of the figures thus [fol. 88] shown for the Big Four, after adjustments for non-operating income and income charges ahead of dividends, and provision for dividends on the preferred stock, is equivalent to $14.48 per share of common stock on the basis of tentative valuation and $32.92 per share of common on the basis of value claimed in the carrier's protest. Final valuation of the properties of the New York Central, the Big Four, and the Michigan Central has not been completed, and nothing herein is to be construed as anywise affecting the determinations hereafter to be made by us in those matters.

The ratios of annual rentals reserved to the minority under the proposed leases of Michigan Central and Big Four properties, to the equities of stockholders in all assets, as

shown by the books of those carriers, is indicated in the following statement:

Carrier	Outstanding stock		Corporate surplus [1]	Stockholders' equity		Annual rental	Ratio (per cent)
	Number of shares	Par value		Total	Per share		
Big Four	570,272	$57,027,200	$58,029,986	$115,057,186	$201.75	$10	[2] 4.95
Michigan Central	187,364	18,736,400	101,136,029	119,872,429	639.78	50	7.81

[1] Balance sheet as of Nov. 30, 1927.
[2] Computed on the basis of tentative valuation, as adjusted by the protective committee, less funded debt, this ratio is approximately 5.79 per cent.

The difference in the ratios, as between the Big Four and the Michigan Central, would seem to give effect in some measure to the history of the carriers as to earnings.

The provisions of the proposed leases for the purchase of minority stock at values determined by bona fide arbitration appear to furnish adequate means for equitable adjustment of grievances of dissatisfied minority stockholders.

Attention has been directed in the record to the collateral-trust indenture dated April 13, 1898, made by the New York Central & Hudson River Railroad Company, a corporate predecessor of the New York Central, to the Guaranty Trust Company of New York, trustee, to secure not exceeding $21,550,000 of 3½ per cent collateral-trust bonds, due February 1, 1998. Certain stock of the Michigan Central is pledged with the trustee under this indenture. It has been averred that by virtue of certain provisions of the indenture the consent of the holders of 75 per cent in amount of the collateral-trust bonds outstanding is prerequisite to the voting of the Michigan Central stock owned by the New York Central for the making of the proposed lease of the properties of the subsidiary company. On behalf of the New York Central this averment is denied without assignment of reasons because the position is assumed that the question is not properly raised in this proceeding. The question presented is one which we can not undertake to decide.

[fol. 89] Jurisdiction

On behalf of the securities corporation it is contended that the New York Central's proposal violates the spirit, it not, indeed, the letter, of paragraphs (2), (4), (5), and (6) of section 5 of the interstate commerce act, in that the pro-

posed acquisitions of control involve consolidation of the carriers concerned into a single system for ownership and operation within the meaning of paragraph (2). It seems necessary only to refer to many other instances in which we have held that control effected by means similar to those here proposed did not constitute consolidation of the carriers involved into a single system for ownership and operation within the meaning of paragraph (2) of section 5.

A major purpose of the transportation act, 1920, by which paragraph (2) of section 5 and related provisions were enacted and inserted in the interstate commerce act, is to preserve "substantially the whole transportation system." Dayton-Goose Creek Ry. v. U. S., 263 U. S. 456, 478. Short lines as well as trunk lines are parts of the national transportation system. In order that effect may be given to the intention of Congress it is essential that remedies calculated to avoid loss of transportation facilities be applied where and as possible.

With respect to these remedies we have heretofore said that union of weak with strong lines is one of the ends which Congress apparently had most definitely in mind and given notice that every carrier proposing unification of railroad properties in advance of eventual consolidation should assume the burden of making reasonable provision in its plan for the possible incorporation of connecting short lines unless omission from the plan or abandonment of any such line or lines be justified. Nickel Plate Unification, 105 I. C. C. 425, 449.

Findings

Upon the facts presented, we find that the proposed acquisition by the Big Four of control of the railroad properties of the Cincinnati Northern and the Terre Haute and the proposed acquisition by the New York Central of control of the railroad system of the Big Four, including all right, title, and interest of the Big Four in the properties of the Cincinnati Northern, the Terre Haute, the Peoria & Eastern Railway Company, and the Kankakee & Seneca Railroad Company, the railroad system of the Michigan Central, and the railroad properties of the Kalamazoo, under, and for the considerations and upon the terms and conditions set forth in the proposed leases, which considera-

tions and terms and conditions we find to be just and reasonable in the premises, will be in the public interest.

[fol. 90] We further find that preservation of the lines of the Alpena, the lines of the Attica, the line of the Federal Valley, the steam railroads of the Fonda, that part of the Owasco's properties hereinbefore referred to as the southern segment, and the lines of the Ulster is required by public convenience and necessity and for the maintenance of an adequate transportation system, as conceived and provided for by the transportation act, and that they are shown to be complementary to and properly apportionable to the New York Central system.

We therefore find that our authorization of the unification herein proposed should be upon the express condition that before said leases become effective, the New York Central shall offer to acquire the lines of the Alpena, the lines of the Attica, the line of the Federal Valley, the steam railroads of the Fonda, that part of the Owasco's properties hereinbefore referred to as the southern segment, and the lines of the Ulster, for considerations equal to the commercial value of the respective properties as determined by agreement between the parties, or by arbitration in the manner prescribed in said leases for valuation of minority shares of stock of the lessors, and hereafter approved by us; and provided further, that the right to determine bona fide compliance with the foregoing conditions is hereby expressly reserved in us; and further provided, that acceptance of and compliance with the conditions precedent herein prescribed shall not be interpreted as relieving the New York Central from the further operation of the law respecting consolidations or as excusing that carrier from further responsibility for the representation made on its behalf that on appropriate occasion for considering the inclusion of so-called short-line railroads, these matters will be approached by the New York Central in a spirit of cooperation looking to their solution with all due regard to the public interest.

Accordingly, the entry of our order of authorization and approval herein will be deferred until compliance with said condition has been shown by proper proof of all pertinent facts relating to the communication of said offers to the short lines concerned, the course and details of nego-

tiations had thereon, and final acceptance or rejection, as the case may be, of said offers by the respective short lines. For this purpose, the record herein will be held open for six months from the date hereof, and on receipt and consideration of such proof a final order will be entered.

EASTMAN, Commissioner, dissenting:

Assuming that the unification here proposed is one which we have power to authorize and which should be approved, I am in accord with the condition which the majority attach relative to certain short lines. However, I am unable to agree with the assumption.

[fol. 91] These are applications for authority to "acquire" control, but it is conceded that in all the cases control exists. It seems clear that what is really proposed is not an "acquisition" of control, but a closer union of properties which are already under common control, and that the result will be for all practical purposes a consolidation of the carriers into a "single system for ownership and operation." Convincing evidence to this effect is afforded by the fact that the economies prophesied are to be accomplished largely by operating changes which hitherto have been "hampered by a proper regard for minority interests." The properties under the new form of union are certainly to be operated as a "single system," and apparently with only one interest which needs to be considered so far as ownership is concerned. What is proposed is, in my opinion, beyond the scope of our jurisdiction under paragraph (2) of section 5 of the interstate commerce act.

The present New York Central is, as stated in the majority report, the result of a consolidation of 11 carrier companies which was consummated in 1914. The 99-year leases here proposed are said to be "steps leading in the direction of consolidation." Apparently this awkward and rather complicated plan of unification through leases was resorted to instead of such a plan as was followed in 1914, merely in the hope of bringing the transaction within the scope of paragraph (2) of section 5 and because we have no present authority in view of the fact that no final plan of consolidation has been adopted under paragraph (5), to approve an actual consolidation of properties. For the

reasons above stated, I do not believe that the plan falls within the scope of paragraph (2). However, even if our jurisdiction be assumed, there are substantial reasons for withholding approval of what is proposed.

Long-term leases are usually a poor way of combining properties, because of the fixed charges which they involve. Such financial objections are minimized here, since the stock of the lessor companies is largely held within the system. But there are other objections which ought to give us pause. We are asked to find that for 99 years fair and reasonable rentals for the respective properties will be amounts sufficient to pay the following dividends upon common stock: Michigan Central, 50 per cent; Cincinnati Northern, 12 per cent; Big Four, 10 per cent; Kalamazoo, 6 per cent; and Terre Haute, 4 per cent.

It is true that no dividends are to be paid upon stock held within the system, but our finding has the same effect as if all of the stock were held outside. Incidentally I find nothing in the majority report justifying the rentals in the case of the Kalamazoo and the Terre Haute, and very little in the case of the Cincinnati Northern, although no [fol. 92] doubt these matters are covered in the record. There is more in the report with respect to the Michigan Central and the Big Four, but the inadequacy even there is shown by the following qualifying statement:

Final valuation of the properties of the New York Central, the Big Four, and the Michigan Central has not been completed, and nothing herein is to be construed as anywise affecting the determinations hereafter to be made by us in those matters.

Now it is all very well to insert such a caveat, but how effective will it be? There is nothing more important than good faith in the public regulation of railroads and other utilities. After we have found, for example, upon a formal record that a rental equal to 50 per cent upon common stock for a period of 99 years is a fair and reasonable rental for the properties of the Michigan Central, can we in good faith at some later time fix a valuation of those properties for rate-making purposes which may prevent the earning of such a rental? I doubt whether that question can be answered in the affirmative, or will be so an-

swered by the courts, however we may answer it ourselves.

It may be that we now know enough about the probable valuations of these properties to be reasonably sure that the rentals proposed will not be inconsistent therewith. There is some indication of this in the report, so far as the Big Four is concerned, but very little in the case of the Michigan Central and none at all in the case of the other properties. But even if we have such knowledge, it is based upon our customary valuation practice, and I am not wholly in accord with that.

Stating it baldly, it seems to me an indefensible anomaly that the public served should be required to pay 50 per cent dividends annually upon the stock of a road like the Michigan Central. It means requiring the public to pay 6 per cent, or some such return, upon property acquired or constructed out of surplus earnings provided by the users of the road in addition to dividends upon stock which have far exceeded limits of reasonable liberality. This is an issue which 20 years ago attracted much attention. It was, for instance, discussed at length in Advances in Rates—Western Case, 20 I. C. C. 307, decided in 1911, and I call attention to the conclusion there reached, at pages 342-343:

> We are not here dealing with the value of this property nor with the definition of value, whether value means investment, cost of reproduction, or something else; our position is that a railroad may not increase rates upon shippers for the reason and as an outgrowth of the fact that it has accumulated out of rates a balance of profit which has been invested in the property. This investment must take care of itself; it must bring a return for itself, either in increased traffic or in the reduction of expenses of operation. There is no justification for the investment of [fol. 93] this surplus if it is to have the effect of increasing the rates upon the shippers over the original line. If the theory is to be recognized that by increasing the value of their property by putting back operating revenue into the property a carrier may as a legal right increase rates, then the shipper is worse off each time he pays a rate which allows a revenue over and above a reasonable return upon the original investment.

I also call attention to what was said as to this question by Senator Cummins as late as February 11, 1918, in his minority report upon the Federal-control act:

> The truth is that the railway properties of the United States have been, to a very considerable degree, constructed or acquired out of excessively high rates exacted from the public. The railway theory has been that the public ought to contribute, through rates for transportation, sums that are not only sufficient to make return upon the capital invested but sufficient to build up and increase the properties, and the outcome of the theory is that the public, having contributed the capital, must again pay for the use of the property so acquired.
>
> The time has come to repudiate a theory so destructive and unjust, and to establish permanently the principle that the public shall not be required to pay interest upon that part of the value of railway property which is constructed or acquired through the surplus earnings after outside or independent capital is fully compensated.

Of late the question has not received the consideration which I believe it deserves, for it involves a principle fundamental in rate regulation. There are no doubt equities which should be considered in the application of this principle to a particular existing property, such as the Michigan Central. The thing of vital importance is the recognition of this principle for future guidance. I have faith that it will eventually be recognized, for it rests upon a basis which is eminently rational. All that the public served should in reason be required to pay the private owners of railroad and other public-utility properties is sufficient compensation to insure the faithful and efficient performance of the public service which they undertake to render, including the supply of capital necessary for the extension of the service. If, however, in times of prosperity the public is able and willing to provide earnings which are in excess of what is needed for such compensation, it ought in reason to be possible to use such earnings, either for the retirement of debt or for the extension of the plant, in such a way that the burden upon the public for the future will be decreased or in any event will not be increased. This is nothing more than the sound economy which is universally recognized in wholly public enter-

prises. It is an economy, however, for which there is no incentive and which is, indeed, impossible of application under the theories of valuation and fair return which are now generally followed.

Since there is no recognition whatever of this principle in the approval of 50 per cent dividends annually for 99 [fol. 94] years upon the stock of the Michigan Central, not to mention some of the other rentals which are approved, I would be unable to join in the majority report even if I were of the opinion that we have jurisdiction in the premises.

McManamy, Commissioner, dissenting:

With the finding of the majority that the acquisition by the New York Central Railroad Company of the control under lease of a group of properties generally known as the New York Central Lines which have long been owned by the New York Central and operated as separate units under the control of the parent company will be in the public interest, I disagree. To my mind the record falls far short of establishing that as a fact.

My first objection goes to the question of our right under paragraph (2) of section 5 to approve this consolidation. It is stated that the purpose of the proposed leases is to bring about handling of the properties by one strong operating unit. The record shows practically complete ownership of the properties here involved by the New York Central Railroad, and the avowed purpose of the parent company in executing the proposed leases is to operate them as a single system. To hold that the acquisition here sought and authorized is not a consolidation of such carriers into a single system for ownership and operation, and therefore beyond our power under the law, is disregarding the substance and grasping at the shadow. My objections with respect to this, however, have been fully stated in former dissents and need not be further discussed here. See Clinchfield Railway Lease, 91 I. C. C. 113.

My next objection goes to the question of public interest. To my mind the showing of public interest here made is woefully inadequate. Public interest is to be promoted by certain operating economies which it is stated can not be brought about under the present organization. The principal ones are: Revision of routes which "it is thought"

will result in substantial improvements and that because of such revision lower transportation costs and increased net earnings will result. Some changes are to be made in the traffic organizations although it is stated that the three major traffic departments will be maintained. Possible new routes, most of which "are available for use at present," will be developed. Certain savings in car-miles estimated to produce a "possible saving" of approximately $1,000,000 annually may be brought about. Yard movements and terminal switching may be reduced so that freight may be routed away from congested terminals and certain accounting operations in connection therewith may be installed. Economies in accounting will be brought about by the elimination of certain records, reports, billings, and correspondence incident to the exchange of equip- [fol. 95] ment, equipment repairs, interline freight and passenger traffic, and joint expenses. Maintenance of equipment costs are to be reduced by the joint use of all repair shops, thereby making certain additional unit extensions now contemplated unnecessary. There are other minor features, but these represent the principal ones. If these economies are practical, why have they not long ago been made effective by the present organization?

The New York Central owns substantially all of the stock of these various carriers. In some it is 100 per cent, and in all cases, with the exception of the preferred stock of the Big Four, it is substantially above 90 per cent. The majority report states:

> Common executives serve both the New York Central and the subsidiary companies, the parent company and the subsidiaries also having interlocking directors. While the boards are not identical in personnel, 13 of the 15 directors serving the Big Four and the Michigan Central also serve the New York Central in similar capacities.
>
> The record does not disclose why with practically complete ownership and with common executives such minor changes in operating methods as are here brought forward to make a showing of public interest can not be made effective without further acquisition by means of a lease. And in any event the alleged economies which were presented are so indefinite and so hedged about with qualifications that they are entitled to little if any weight.

My third objection is to the complete disregard which is shown throughout this record for the welfare of the short-line connections. The applicants contend that this is not an appropriate occasion for considering the inclusion of any so-called short-line railroads, and nowhere in the record is it indicated when such an appropriate occasion might arise. Under the circumstances the suggestion of some of the short-line interests that the appropriate occasion for considering the short lines may not arise for 99 years is wholly justified.

My conception of what the Congress had in mind when it included in the transportation act the provision for the consolidation of railroads is that systems of railroads should be created which would adequately serve all of the territory properly tributary to each system which would necessarily include connecting short lines. Certainly Congress did not reverse public policy to the extraordinary extent of exempting railroads from the provisions of the antitrust laws and other restrictive laws merely to make it possible for the large and strong systems to consolidate thereby making the strong stronger and the weak helpless.

In the Nickel Plate case, 105 I. C. C. 425, we said:

[fol. 96] But the importance of the problem of the short lines in their relation to this subject can not be too strongly emphasized. One of the chief criticisms of the unifications which have been proposed or suggested has been that certain of them do not embrace related weak lines, although the union of the weak with the strong lines is one of the ends which Congress apparently had most definitely in mine.

We further said:

Every applicant should assume the burden of making reasonable provision in its plan for the possible incorporation of every connecting short line now in operation in the territory covered or to be covered by the proposed grouping or unification. No branch line or short line now in operation within the territory in question should be left out of the consideration unless by affirmative testimony the abandonment of operation of such line or its omission from the plan has been justified.

The above statements represent very definite and, to my mind, sound principles, yet the applicants in this case have wholly disregarded them. The record shows that con-

nected with the New York Central Lines are 72 short-line railroads in varying degrees of prosperity, yet their welfare has been disregarded, and consideration is not to be given them until some time in the very indefinite future. It is true the majority have required that consideration be given to certain short-line interveners, but, to my mind, that does not meet the needs of this situation.

One of the most important problems confronting us is the disposition or preservation, if you please, of what are known as the short-line railroads. During 1927, 574 short lines reported to us. Of these 253 incurred an actual deficit. How long they can survive under such conditions is problematical. Therefore, in my opinion, our expressions in the Nickel Plate case, above quoted, should govern in all applications for consolidation. And I think it appropriate to state here that I am not in accord with the views expressed in our annual reports that we should be relieved from the task of preparing a plan of consolidation. If consolidations are to be made, they should be in line with a definite and comprehensive plan prepared by someone not financially interested in the result so that public and not private interest may be first served. In no other way can what I believe to be the purpose of the transportation act be effectuated. That there are difficulties, I admit, but none that are insurmountable.

I also disagree with the policy of consolidating railroad properties by means of long-term leases, particularly when, as here, the owner is both lessor and lessee.

No reason appears on this record for haste in disposing of this application. The service is said to be efficient and the returns liberal. To my mind this consolidation can not be lawfully granted at this time and, in any event, it should not be granted without adequate consideration being given to all connecting short lines. If they are not before us in [fol. 97] this record, then consideration should be given under Docket No. 12964, Consolidation of Railroads, which has long been before us.

TAYLOR, Commissioner, dissenting:

The New York Central system is now, for all practical operating purposes, under common control, and there seems to be no definite present public interest which requires the granting of these applications, which, in my opinion, will result in a virtual consolidation of the lines concerned.

We have asked Congress to relieve the commission of the duty of adopting a complete plan of consolidation and it is a matter of knowledge that a new bill is being prepared in response to our suggestions.

One result of the granting of these applications will be that it relieves the applicants from the operation of certain Federal and State laws, which might otherwise be invoked in the public interest. While authority is granted subject to "further operation of the law respecting consolidation," after the so-called unification has been completed it will become exceedingly difficult, if not impossible, to separate any of the component parts of the system or to make any change in its unified structure, if such action should be necessary in the public interest. Therefore, while the reservations in terms provide for the possibility of change resulting from a new law, the power to make such change will be impaired, if not destroyed, after these unifications are effected.

I think that this grant, which permits the most important so-called unification of any of the railroads of the United States, before Congress has spoken again upon the subject, is at least premature.

[fol. 98] EXHIBIT "B" TO ANSWER OF I. C. C.

F—3770

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 5690[1]

New York Central Unification

Submitted May 7, 1929. Decided July 2, 1929

1. Offers of New York Central Railroad Company to acquire specified short-line railroads considered and found to be in compliance with condition prescribed in previous report, 150 I. C. C. 278.

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[1]With which is consolidated Finance Docket No. 5688, Acquisition of Control by Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

2. Acquisitions of control heretofore found to be in the public interest, approved and authorized. Further conditions prescribed.

Appearances, in part, as noted in 150 I. C. C. 278.

Robert J. Cary and Clyde Brown for New York Central Railroad Company, petitioner.

Elihu Root, Jr., Grenville Clark, and Henry J. Friendly for protective committee of Cleveland, Cincinnati, Chicago & St. Louis Railway Company common-stock holders, intervener.

Edward C. Bailly for Fonda, Johnstown & Gloversville Railroad Company, C. C. McChord, R. Granville Curry, and Frederick M. Dolan for Federal Valley Railroad Company, Moultrie Hitt and Clarence A. Miller for Chicago, Attica & Southern Railroad Company, and H. H. Fleming and James W. Carmalt for Ulster & Delaware Railroad Company, interveners.

Supplemental Report of the Commission

By the COMMISSION:

We have heretofore considered the record in this proceeding in extenso and stated our conclusions in our report of January 14, 1929, 150 I. C. C. 278. As supplemented, the record is again before us for consideration of certain matters previously reserved for future determination. Adopting designations followed in our original report, the New York Central Railroad Company will be referred to herein as the New York Central; the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, as the Big Four; the Boyne City, Gaylord & Alpena Railroad Company, as the Alpena; the Chicago, Attica & Southern Railroad Company, as the Attica; the Federal Valley Railroad Company, as the Federal Valley; the Fonda, Johnstown & Gloversville Railroad Company, as the Fonda; the Owasco River Railway, as the Owasco; and the Ulster & Delaware Railroad Company, as the Ulster.

[fol. 99] Our findings, and conditions heretofore prescribed by us, appear at length in our printed report, supra, at pages 321 and 322. For convenience of reference, clauses pertinent to the present issue may be restated, in brief, as follows.

We found—

1. That the proposed acquisitions by the Big Four and by the New York Central, respectively, of control of specified railroad properties, under lease, will be in the public interest.

2. That the considerations and terms and conditions of the proposed leases are just and reasonable in the premises.

3. That preservation of certain short-line railroads, namely, the lines of the Alpena, of the Attica, and of the Ulster, the line of the Federal Valley, the steam railroads of the Fonda, and the part of the Owasco's properties called the southern segment (previous report, page 307) is required by public convenience and necessity within the meaning and intent of the transportation act, 1920, and therefore,

4. That our authorization of the proposed unification should be upon the express condition that before the proposed leases become effective, the New York Central shall offer to acquire the specified short lines for considerations equal to their commercial value as determined (a) by agreement between the parties or (b) by arbitration in the manner prescribed in the leases for valuation of minority shares of stock of the lessors, and hereafter approved by us.

Expressly reserving the right to determine bona fide compliance with that condition, we deferred the entry of our order of authorization and approval until such compliance has been shown by proper proof and we have held the record open for the purpose of receiving and considering such proof.

In a supplemental petition filed on April 27, 1929, the New York Central avers that it has in good faith and with due diligence complied with our requirements and, in support thereof, has presented authenticated documentary evidence concerning negotiations conducted with each of the short-line carriers involved. It is prayed that we close this proceeding and by order grant the authorization and approval originally sought.

It is shown that under date of December 1, 1928, the New York Central obtained an option to purchase, subject to our approval, all the Owasco's capital stock from the International Harvester Company for $75,000 in cash. On April 18, 1929, the latter company was advised, in writing, that the New York Central proposes to acquire the stock, to make application to us for authority necessary in the

premises, and, upon receipt thereof, to exercise the option. The details of the option agreement, as clarified in subse-
[fol. 100] quent correspondence between the parties, are reserved for consideration in the proceeding in which application for our authority is made. It is sufficient for our present purpose to notice that under control of the New York Central, as contemplated, the Owasco is to retain the southern segment. We are therefore of opinion that the arrangement made in the case of the Owasco is, in principle, an acceptable substitute conforming to the purpose sought to be accomplished by the condition prescribed by us.

On February 2, 1929, the president of the New York Central addressed to the principal executives of the short-line carriers concerned, except the Owasco, identical letters to the effect that the New York Central was then prepared to begin negotiations contemplated in our original report. The five short-line carriers exclusive of the Owasco will hereafter be referred to jointly as the short lines.

It appears that conferences were then had between representatives of the New York Central and of each of the short lines. It is stated that the New York Central made specific offers to acquire the various properties involved for considerations deemed by it to be equal to their commercial value. In no instance was the amount proffered acceptable to the short-line carrier nor were the parties able to reach an agreement upon such commercial value. Consequently, on March 6, the New York Central notified the other parties, except the Fonda, that it desired to arbitrate the matter of consideration and with such notices submitted drafts of proposed arbitration agreements. Negotiations with the Fonda assumed a somewhat different aspect.

In general the agreements tendered for consideration of four of the short lines provide for determination, subject to our approval, of the commercial value of the respective properties by three arbitrators, for the selection of one arbitrator by each of the parties to the agreement and of the third by the two so chosen, for the conduct of the arbitration and the making of an award in writing, and for payment of fees and expenses. It is then provided that upon receipt of copies of the award, each party is to submit the same for our consideration, with such objections, if any, as it may have thereto. If the award is approved by us, the New York Central will offer, in writing, to acquire the prop-

erty for a consideration equal to the commercial value so determined and approved. The other party is to have 30 days from the receipt of such offer to accept or reject the same. If accepted, the New York Central forthwith is to apply to us for authority to acquire the property in accordance with the accepted offer.

Arbitration agreements containing these provisions have been entered into by the New York Central with the Federal Valley, under date of March 25, 1929, and with the Alpena, [fol. 101] under date of April 24, 1929. The agreement with the Alpena takes into account a trackage agreement made or about to be made between the Alpena and one J. R. Sensibar, of Chicago. From information now before us, it appears that two arbitrators have been chosen in accordance with the agreement with the Federal Valley and that the New York Central has designated its arbitrator under the agreement with the Alpena.

It has been mutually agreed between the Ulster and the New York Central that no separate agreement is necessary as our previous report provides for arbitration in the manner prescribed in the proposed leases and the applicable provisions of the leases adequately set forth the procedure to be followed. In accordance with this understanding, all three arbitrators have been chosen.

The Attica and the New York Central were unable to agree upon a form of arbitration agreement. On April 18, the latter, in accordance with the procedure prescribed in the proposed leases, gave to the Attica written notice of its desire to determine by arbitration the commercial value of the Attica's properties in order to enable it to make an offer to acquire the properties, and of the selection of an arbitrator. Concurrence in the procedure has been indicated by notice dated April 24, 1929, of the selection of an arbitrator by and on behalf of the Attica. The latter has filed an answer contending that the supplemental petition is premature and should be denied. The situation as to the Attica seems somewhat similar to that in the case of the Ulster.

Complete dissatisfaction of the Fonda with the New York Central's offer to acquire properties of the former led to the conclusion that it would be necessary for the Fonda to apply to us for reopening of this proceeding to take further testimony and hear argument in the matter of including in the

condition prescribed by us the Fonda's electric lines, as well as the steam lines. Such a petition was filed on April 11. In response to notice similar to that given the Attica, on April 27 the Fonda advised the New York Central that the proposal to arbitrate was out of order because the petition to reopen was then pending before us. The petition was denied on May 6.

By answer filed on the same day, the Fonda contends that no bona fide offer was made by the New York Central to acquire the steam railroads of the Fonda, that the New York Central has failed to comply with the requirements of our previous report, and that the supplemental petition is premature and should be dismissed. The Federal Valley also denies that there has been compliance with the condition. It is urged that there has been failure of agreement upon the commercial value of the Federal Valley's properties and likewise failure of determination of such value by [fol. 102] arbitration since the third arbitrator has not even been selected, and, therefore, that the New York Central has not yet made an offer to acquire the properties. Fearing that we may lose control over the subject matter, the Federal Valley asks that the supplemental petition be denied. In substance this is the position assumed also in an answer filed by the Ulster.

It seems clear that the sense of our condition is that, subject to ultimate approval by us, the considerations, equal to commercial value, payable by the New York Central for properties of the short lines, are to be determined by agreement between the parties, or agreement failing, then by arbitration. However inadequate the initial offers of the New York Central may have been deemed by the short lines, once the fact of irreconcilable disagreement became fixed it was the duty of the parties to resort to arbitration. Since provision for arbitration has or can yet be made by legally enforceable contracts, and those contracts will bind the New York Central to make further offers in accordance with the awards of the arbitrators, as approved by us, we think the contentions of the Attica, the Fonda, the Federal Valley, and the Ulster are without merit. Certainly there is no substance in the Federal Valley's observation that the third arbitrator has not been selected. The arbitration agreement between the New York Central and the Federal Valley expressly provides

that if the arbitrators chosen by the parties to the contract shall fail, within a designated time, to select the third, then the third arbitrator may be appointed by the senior judge of the Federal court named in the contract.

The intervener referred to in our previous report, page 280, as the protective committee contends that the supplemental petition should be denied upon much the same grounds originally urged in opposition to the New York Central's application herein and upon the further ground that, even under the construction given thereto in our former report, the asserted inadequacy of the rental provided in the proposed lease of the Big Four's properties is in no way cured by the provisions of the lease relating to purchase of minority shares of the lessor's stock. This contention merely implies necessity for review of our previous finding.

We are of opinion and find that the offers of the New York Central, and steps taken subsequent thereto, are in bona fide compliance with the condition prescribed in our previous report. We believe, nevertheless, that additional precautions may reasonably and ought to be provided in order to insure that there be no miscarriage in the final consummation of our purposes. Accordingly our authorization and approval herein will be upon the further express conditions:

[fol. 103] 1. That opportunity be accorded to the Fonda within six months from the date hereof to designate an arbitrator and thereupon be entitled to arbitration in accordance with applicable provisions of the leases and to receive an offer from the New York Central for the purchase of its steam railroads in accordance with the award of the arbitrators.

2. That nothing herein shall be construed to relieve the Big Four or the New York Central from compliance with provisions of law applicable to any assumption of obligations and liabilities, etc., by virtue of execution of the proposed leases.

3. That no stock of the lessor companies shall be sold or otherwise disposed of by the Big Four or by the New York Central without authority from us first had and obtained.

4. That all conditions heretofore prescribed by us in this proceeding shall remain in full force and effect.

An order authorizing and approving the proposed acquisitions of control, upon the conditions aforesaid, will be entered; but jurisdiction is retained to reopen the proceeding, on our own motion or for good cause shown, for the entry of such supplemental orders herein as we may deem necessary or appropriate.

Commissioners Eastman, McManamy, and Taylor dissent for reasons stated in their dissents to the original report in 150 I. C. C. 278.

Order

Entered July 2, 1929

Hearings and investigation of the matters and things involved in this proceeding having been had, and the commission having, on January 14, 1929, and on the date aforesaid, made and filed reports containing its findings of fact and conclusions thereon, which reports are hereby referred to and made a part hereof:

It is ordered, That the acquisition by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company of control of the railroad properties of the Cincinnati Northern Railroad Company and of the Evansville, Indianapolis & Terre Haute Railway Company, and the acquisition by the New York Central Railroad Company of control of the railroad system of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, including all right, title, and interest of said company in the properties of the Cincinnati Northern Railroad Company, the Evansville, Indianapolis & Terre Haute Railway Company, the Peoria & Eastern Railway Company, and the Kankakee & Seneca Railroad Company, [fol. 104] of the railroad system of the Michigan Central Railroad Company, and of the railroad properties of the Chicago, Kalamazoo & Saginaw Railway Company, in accordance with the terms of the proposed leases set forth in the applications, and upon the conditions prescribed in said reports, be, and the same are hereby, approved and authorized.

It is ordered, That, within 10 days after the execution thereof, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the New York Central Railroad Company, or either of them acting for both, shall file with this commission duly verified copies of said leases in the form in which executed.

It is further ordered, That the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the New York Central Railroad Company shall report to this commission as required by valuation order No. 24, effective May 15, 1928.

And it is further ordered, That this order shall become effective 30 days from its date, provided within that time the New York Central Railroad Company shall have filed herein formal acceptance of the conditions prescribed in the orders in this proceeding.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 105] [File endorsement omitted.]

[fol. 106] [File endorsement omitted]

Service of copy of within answer hereby admitted Oct. 15, 1929.

House, Grossman & Vorhaus, Solicitors for Plaintiff.

[fol. 107] In United States District Court

[Title omitted]

Joint and Several Answer of the New York Central Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and the Michigan Central Railroad Company—Filed Oct. 15, 1929

The New York Central Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company and The Michigan Central Railroad Company, defendants in the above-entitled cause, for answer to the petition herein, answer and say:

[fol. 108] I

Answering paragraph 1 of said petition, these defendants are without knowledge of the State of incorporation, citizenship, residence or place of office of the petitioner. These defendants admit that the petitioner is the holder of record of shares of stock of each of the defendant Railroad Companies, parties to this suit, the amounts of which holdings are set out in paragraph X hereof.

II

Answering paragraph 2 of said petition, these defendants admit that the suit of the petitioner purports to be brought under and pursuant to the provisions in that behalf of Section 46 of Chapter 2, Title 28, United States Code, being Section 208 of the Judicial Code, for the purpose in said paragraph mentioned.

III

Answering paragraph 3 of said petition, these defendants admit the allegations therein contained.

IV

Answering paragraph 4 of said petition, these defendants admit the allegations therein contained.

V

Answering paragraph 5 of said petition, these defendants admit the allegations therein contained.

[fol. 109] VI

Answering paragraph 6 of said petition, these defendants admit that the order of the Interstate Commerce Commission concerning which this suit is brought was made upon the application of the defendant, The New York Central Railroad Company, for authority to acquire control by lease of the railroad systems, inter alia, of the Big Four and Michigan Central Companies. They deny that the proposed leases for such acquisition of control have already been executed and delivered, and they have no knowledge as to where such leases will be delivered when executed.

They furthermore neither admit nor deny that the matter submitted upon said application to the Interstate Commerce Commission arises in the Southern District of New York, wherein this suit is brought purportedly under and pursuant to Section 43 of Title 28 of the United States Code.

VII

Answering paragraph 7 of said petition, these defendants admit the allegations therein contained, except that they deny that the proposed leases referred to in said paragraph have already been executed, and further deny that said leases are renewable for any period after the term of ninety-nine years in said leases specified.

VIII

Answering paragraph 8 of said petition, these defendants admit that the applications referred to in paragraph 7 [fol. 110] of said petition disclose that the railroads and properties of The Cincinnati Northern Railroad Company and of the Evansville, Indianapolis and Terre Haute Railway Company are now controlled through stock ownership by, and will (subject to the Commission's authorization in said proceeding) be leased to, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and that thereupon said proposed leaseholds will be transferred to The New York Central Railroad Company.

These defendants further admit that under the proposed leases the New York Central will operate the lines of the Big Four and Michigan Central, respectively, between the points mentioned in said paragraph 8. They deny all the other allegations in said paragraph contained. The defendants aver that the railways of these defendants taken in the aggregate form a complementary relationship to each other in the rendition of efficient carrier service, and that for many years last past they have been continuously operated in the development of such relationship.

IX

Answering paragraph 9 of said petition, these defendants admit that the petitioner herein filed a petition of intervention before the Interstate Commerce Commission, as in said paragraph 9 alleged.

X

Answering paragraph 10 of said petition, these defendants admit that the petitioner herein, Clarence H. Venner, [fol. 111] C. H. Venner & Company, General Investment Company and Continental Securities Company are the holders of record, respectively, of the following shares of stock:

	N. Y. C. R. R. Co.	M. C. R. R. Co.	C., C., C. & St L. Ry. Co.
New York Central Securities Corporation	66 shs.	16 shs.	100 shs.
Clarence H. Venner	92 "	...	...
C. H. Venner & Company	500 "	170 "	...
General Investment Company	575 "	...	...
Continental Securities Company	133 "	100 "	...

These defendants aver that all of said corporate holders of stock are controlled by Clarence H. Venner.

XI

Answering paragraph 11 of said petition, these defendants admit the allegations made in the first subdivision thereof, that the terms, covenants and provisions of said proposed leases of the said Big Four, said Michigan Central and said Chicago, Kalamazoo and Saginaw Railway Company to said applicant, The New York Central Railroad Company, and the present and proposed relations of said carriers among themselves are such as to constitute the control of the three former by the latter, under such leases and otherwise. They deny, however, the allegation in said subdivision made, that such control involves the consolidation of such carriers into a single system for ownership and operation within the meaning and prohibition of Section 5, paragraph 2, of the Interstate Commerce Act, as amended August 24th, 1912, and February 28th, 1920, by 24 Stat. L. 379 and 41 Stat. L. 480.

[fol. 112] Answering subdivision (a) of said paragraph 11, these defendants admit the allegations therein contained with respect to holdings of shares of stock; that the railroads and systems in said paragraph mentioned are now operated as part of the New York Central Lines, and that said proposed leases contain provisions for the purchase by the lessee of all offered minority shares of said lessor companies as in said proposed leases set forth.

They deny all other allegations in said subdivision (a) contained.

Answering subdivision (b) of said paragraph 11, these defendants admit that said proposed leases are for the term and period of ninety-nine years each. They deny all other allegations in the said subdivision (b) contained.

Answering subdivision (c) of said paragraph 11, these defendants admit that all of the said railways and systems involved in said proposed leases are now being operated in common control with the defendant, The New York Central Railroad Company, under the common designation "The New York Central Lines," with substantially identical or closely interlocking boards of directors and certain common administrative or executive officers; and that said leases contemplate complete unification of administration and operation of the properties covered by the same. They deny that they contemplate or provide for the ultimate absolute ownership of said railways and systems by the said The New York Central Railroad Company, exclusively, and in and under its own name; and that there is thereby involved, as aforesaid, the consolidation of such carriers into a single system for ownership and operation.

[fol. 113] Answering subdivision (d) of said paragraph 11, these defendants admit that said proposed leases, by Section 3 of the Article in each indenture entitled "Covenants of the Lessor," authorize the abandonment, retirement, sale or other disposal by the lessee of any of the lessors' lines of railway and of any material, equipment, or other tangible personal property not required in the judgment of the lessee for the proper operation and maintenance of the demised premises and any lands, buildings, structures or facilities not longer required for such operation and maintenance, so far as such powers may be exercised in conformity with law and the provisions of any mortgages or other agreements affecting any such property. They aver, however, that said Section 3 also provides that the proceeds of any property so sold, except as otherwise provided in any such mortgage, shall be applied, without any right on the part of the lessee to reimbursement by reason thereof, for improvements, betterments or additions thereon or to the railroads or other physical properties leased, or some portion thereof, or upon or to the physical

properties of any such leased line, as the case may be. It is further provided in said Section, in substance, that the general integrity and continuity of the transportation system of the lessor shall in no event be impaired by the exercise of any such rights, powers and privileges by the lessee, and that without the consent of the Board of Directors of the lessor, the lessee shall not abandon, retire, sell, or otherwise dispose of any line or lines of railway (other than spur, industrial, team, switching or side tracks), and that except as to certain personal property, the disposition of and accounting for which is provided for in Article IX of [fol. 114] said lease, the lessee shall, at the expiration or other termination of said lease, as provided in Article X thereof, account to the lessor for the net amount of the retirements in connection with the physical properties demised that may be consumed, abandoned, sold or otherwise disposed of under the provisions of said Section 3.

These defendants further admit that by Section 2 of the same Article, the lessee is given the right and power at all times during the term of the lease to extend, add to and better the railroads and other physical properties of the lessor, and of the leased lines. These defendants, however, aver that any such extensions, additions and betterments will, under the terms of said lease, become identified with and a part of the properties of the lessor. They deny that the provisions of said Sections 2 and 3 of said Article of said lease, entitled "Covenants of the Lessor," allow or intend the several railway properties of the lessors and lessee to be moulded into complete physical union under the lessee's domination, and thereby accomplishing and involving, as alleged in said subdivision (d), the consolidation of such carriers into a single system for ownership and operation.

Answering subdivision (e) of said paragraph 11, these defendants deny the allegations therein contained. They aver that the railways of these defendants taken in the aggregate form a complementary relationship to each other in the rendition of efficient carrier service, and that for many years last past they have continuously been operated in the development of such relationship.

Answering subdivision (f) of said paragraph 11, these [fol. 115] defendants deny the allegations therein contained.

XII

Answering paragraph 12 of said petition, these defendants admit that the petitioner alleged before the Commission the matters and things therein set forth. They deny all other allegations in said paragraph 12 contained.

XIII

Answering paragraph 13 of said petition, these defendants admit that the petitioner alleged before the Commission the matters and things therein set forth, but these defendants deny all other allegations in said paragraph 13 contained.

XIV

Answering paragraph 14 of said petition, these defendants deny knowledge of the allegations therein contained, except that they admit that the petitioner alleged before the Commission the matters and things therein set forth.

XV

Answering paragraph 15 of said petition, these defendants admit that the petitioner alleged before the Commission the matters and things therein set forth; but they aver that they have no knowledge as to the truth of the same except that they admit that in the division of railways into systems, to be provided for in the tentative plan of the Com- [fol. 116] mission to be agreed upon by the Commission under paragraph (5) of Section 5 of the Interstate Commerce Act, competition is to be preserved as fully as possible, and, wherever practicable, the existing routes and channels of trade and commerce shall be maintained, as provided by paragraph (4) of the same Section of the said Act.

They deny, however, that the control by said applicant, The New York Central Railroad Company, of said other carriers under said proposed leases will involve the consolidation of said carriers into a single system for ownership and operation. They further deny that the making of said leases will entail the suppression of competition and will not preserve and maintain, wherever practicable, the existing routes and channels of trade and commerce.

XVI

Answering paragraph 16 of said petition, these defendants admit that the petitioner alleged before the Commission the matters and things therein set forth.

They deny that the terms of the proposed leases are oppressive to the lessors' minority stockholders and that the returns to the stockholders of the lessor companies as provided in said proposed leases are disproportionate to the valuation of their respective properties and to their demonstrated earning powers, respectively.

They further aver that the allegation in said paragraph in respect of the disposition under said proposed leases of [fol. 117] the cash and other liquid assets of the lessor is an inaccurate and misleading statement. In this respect, they aver that under the Article of said proposed leases, entitled "Cash, Current Assets and Liabilities and Accounting Therefor," it is provided in substance, that all cash of the lessor and all other current assets, except materials and supplies and special deposits elsewhere disposed of in said leases, are to be transferred to the lessee as of the effective date of the leases, but that the net proceeds of the same are to be applied to current and deferred liabilities of the lessor, and that at the expiration of the terms of the leases the lessee is to restore and deliver to the lessor any balance of said cash and current assets, or the net proceeds thereof, that the lessee shall not have expended for the account of the lessor for the purposes aforesaid. It is further provided in said leases that the lessee is to pay and discharge all the current liabilities of the lessor existing at the effective date of the leases and all of the deferred liabilities of and valid claims against the lessor arising out of the transactions prior to the effective date of the leases, and if the amount of cash and the net proceeds of current assets and claims transferred by the lessor to the lessee shall be insufficient to provide in full for said payments the lessor upon the expiration or other termination of the leases is to account to the lessee for any such deficiency. Said leases provide for an accounting at the end of the terms in respect of all such subject matters, to the end that the lessor shall be fully protected in respect of the transfer by it to the lessee of its cash and other current assets.

These defendants admit the allegation in said paragraph [fol. 118] contained that said proposed leases provide for

a rental (erroneously called a dividend in said paragraph) to the minority stockholders of The Michigan Central Railroad Company at the rate of $50 per share per annum throughout the period of said lease. These defendants aver that a copy of each of said proposed leases was annexed to and made a part of the Application of The New York Central Railroad Company to the Commission in said Docket 5690; and said application having by reference and by allegation of filing therewith been made a part of the petition herein, as stated in paragraph 7 thereof, these defendants refer to the said proposed leases for the full textual content and purport thereof in the respects considered in said paragraph 16 of the petition as well as in any other respects considered elsewhere in the pleadings herein as may be relevant in this suit.

They deny that said rental (erroneously called a rate of dividend) is a grossly inadequate return on the valuation of said railroad or its capital stock, or that it is a deprivation forced upon said minority stockholders or a correspondingly unfair and unlawful advantage exacted by the majority stockholders of said Company, in violation of any trust relationship occupied by the latter to the former. They admit that in the valuation proceeding of the Michigan Central pending before the Commission, numbered 564 on its valuation docket, certain proceedings were had; they deny the allegations in respect of this subject matter averred in said paragraph for the purpose of showing that the rental provided for in the proposed lease of the said Michigan Central is inadequate or unfair in any respect to the minority stockholders of the said Railroad Company.

[fol. 119] XVII

Answering paragraph 17 of said petition, these defendants admit that the petitioner alleged before the Commission the matters and things therein set forth.

These defendants admit that The Michigan Central Railroad Company paid dividends on its capital stock, as follows:

For the year 1921 at the arte of 6%; for the year 1922 at the rate of 14%; for the year 1923 at the rate of 20%; for the year 1924 at the rate of 20%; for the year 1925 at the rate of 27½%; for the year 1926 at the rate of 35%; for the year 1927 at the rate of 40% from income and in

addition 50% payable out of surplus; and for the year 1928 at the rate of 40%.

These defendants deny that the corporate surplus of The Michigan Central Railroad Company on January 1, 1915, was the sum of $12,361,195.00, and aver that as of said date the corporate surplus was in the sum of $16,709,236; these defendants admit that on April 30, 1926, the corporate surplus of said Company was in the sum of $82,779,597.00; these defendants admit that as of December 31, 1928, the corporate surplus of The Michigan Central Railroad Company was the sum of $100,428,397.00; and these defendants admit that the net corporate income of The Michigan Central Railroad Company for the years 1923 to 1928, inclusive, and the dividends paid from income for each of said years are correctly shown in the tabulation contained at the end of said paragraph 17 of the petition.

[fol. 120] These defendants deny all the other allegations in said paragraph 17 contained.

XVIII

Answering paragraph 18 of said petition, these defendants admit that the petitioner alleged before the Commission the matters and things therein set forth.

These defendants admit that the proposed Big Four lease provides for a fixed rental (erroneously called a dividend in said paragraph) of $5 per share per annum to be paid to the minority stockholders of the preferred stock, and of $10 per share per annum to be paid to the minority stockholders of the common stock of said Company; they admit that the statistics of net income and dividends of the Big Four Company are approximately as stated in said paragraph.

They deny all other allegations in said paragraph 18 contained.

XIX

Answering paragraph 19 of said petition, these defendants admit that the petitioner alleged before the Commission the matters and things therein set forth.

They further admit that none of the proposed lessor Companies applied to the Commission for the authorization of the leases by them of their respective properties. They aver, however, that each and every of the proposed lessors

was properly represented before the Commission, and they [fol. 121] deny the allegation in said paragraph contained that without applications to the Commission by the said proposed lessors an order by the Commission authorizing said New York Central to become lessee of said properties is insufficient and unavailing under the provisions of the Interstate Commerce Act.

XX

Answering paragraph 20 of said petition, these defendants admit that the petitioner alleged before the Commission the matters and things therein set forth.

They deny each and every other allegation in said paragraph contained.

XXI

Answering paragraph 21 of said petition, these defendants admit that the petitioner alleged before the Commission the matters and things therein set forth.

They deny each and every other allegation in said paragraph contained.

XXII

Answering paragraph 22 of said petition, these defendants admit that the petitioner alleged before the Commission the matters and things therein set forth.

They deny each and every other allegation in said paragraph contained.

[fol. 122] XXIII

Answering paragraph 23 of said petition, these defendants admit that the petitioner alleged before the Commission the matters and things therein set forth.

They further admit the allegations of fact in said paragraph contained in respect of the execution of the certain indenture, made on the 13th day of April, 1898, styled "Three and one-half per cent. Indenture, Michigan Central Collateral—$21,550,000.00," and of the succession in interest and obligation thereto of The New York Central Railroad Company to the New York Central & Hudson River Railroad Company.

They further admit the pledging of shares of the capital stock of the Michigan Central to secure the payment of the

issue of the bonds under said Collateral Indenture, and that of said bonds $19,336,000 are still outstanding, and that the collateral pledged as aforesaid is still held by the Trustee.

They deny, however, that by the terms of said Indenture the consent and express approval of the holders of 75% in amount of said bonds is a prerequisite condition, without compliance with which the majority stock of the Michigan Central held by or for said applicant may not be voted for any lease of the Michigan Central Property, or that the said New York Central has no power or right to vote the same without first obtaining such consent.

They further deny that in consequence of the want of said [fol. 123] consent said lease, when consummated and put into operation, will be void and will constitute and impose a cloud and burden upon the property and property rights of the Michigan Central and its stockholders, including the petitioner. They have no knowledge of the allegation in said paragraph contained, that the holder or holders of some of said 3½% Gold Bonds have filed protest with said Trustee under said Collateral Indenture against permitting the majority stock of said Michigan Central Railroad, so held by it as collateral, to to be voted in favor of said lease without the consent of such 75% of the holders of said bonds first had and obtained.

They deny, however, that the execution of said lease as proposed threatens irreparable injury and damage to the Michigan Central or its minority stockholders, including the petitioner.

They further aver that the petitioner has no interest in and cannot complain of the subject matters set forth in said paragraph 23, as it makes no showing that it or any of the parties on whose behalf said petition purports to be filed is an owner of or interested in any of said Michigan Central collateral indenture bonds.

XXIV

Answering paragraph 24 of said petition, these defendants admit that the petitioner alleged before the Commission the matters and things therein set forth.

In respect of the allegation in said paragraph contained, that said applicant's lines are parallel and competitive with [fol. 124] those of said lessor companies and that said

lessor lines are competitive with one another, these defendants make answer thereto as set forth in paragraphs VIII and XI hereof.

They deny the truth of the allegation in said paragraph 24 contained, that said proposed leases are not within the corporate powers of either of the companies involved, or that each is ultra vires as to each party thereto or is illegal, null and void.

XXV

Answering paragraph 25 of said petition, these defendants refer to the report of the Interstate Commerce Commission made in Finance Docket No. 5690 on the 14th day of January, 1929, and reported in 150 I. C. C., at page 278, et seq., a copy of which report will be produced on the trial of this suit.

XXVI

Answering paragraph 26 of said petition, these defendants admit that on the 2nd day of July, 1929, the Interstate Commerce Commission entered its final order in said proceeding (Finance Docket No. 5690) and that within the time limited in said order The New York Central Railroad Company filed formal acceptance of the conditions prescribed in the order in said proceeding, and that said order has accordingly become effective as of the 1st day of August, 1929.

For answer to the allegations of the said paragraph with respect to the acquisition of so-called "short lines," [fol. 125] these defendants refer to the reports and order of the Interstate Commerce Commission in said Finance Docket No. 5690, copies of which will be produced on the trial of this suit.

XXVII

Answering paragraph 27 of said petition, these defendants deny that the petitioner will be injured irrevocably or otherwise by the carrying out of said leases and the order of the Commission in the premises. They further deny that the petitioner is entitled to any relief whatsoever or any part of the relief in said petition demanded and allege that it has no standing in this Court or in any Court of Equity.

XXVIII

These defendants deny each and every allegation in the said petition not herein specifically admitted or denied.

XXIX

These defendants for a further answer aver that the matters and things set forth in said petition and particularly in paragraphs 8 to 27, both inclusive, of the same, and sought to be put in issue before the Court, were all before the Interstate Commerce Commission in said applications referred to (Finance Docket No. 5688 and No. 5690, consolidated for hearing as No. 5690) and were made issues therein by the petitioner herein, intervenor in said proceeding; that said matters, after due notice to all parties to said proceeding and after full submission of evidence [fol. 126] thereon by all parties in interest, were fully heard and determined by the Commission and were within its power and authority to so hear and determine under the provisions of the Interstate Commerce Act; that thereafter, to wit, on the 14th day of January, 1929 said Commission made its certain report, in writing, in said proceeding and on the 2nd day of July, 1929, made its further report and order therein, which reports and order are fully supported by substantial evidence adduced in said proceeding, whereby the matters and things of which complaint is made in said petition and in said paragraphs were fully considered, determined and finally disposed of pursuant to law.

All of which matters and things these defendants are ready to aver, maintain and prove, as this honorable Court may direct, and hereby pray that said petition be dismissed at the cost of the petitioner and for such other and further relief and order as may be appropriate.

The New York Central Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Michigan Central Railroad Company, by Robert J. Cary, Jacob Aronson, Solicitors. Office and P. O. address: 466 Lexington Avenue, New York, N. Y. Robert J. Cary, Jacob Aronson, Frank E. Robson, Harry N. Quigley, of Counsel.

[fol. 127] *Duly sworn to by Albert H. Harris. Jurat omitted in printing.*

[fol. 128] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR LEAVE TO INTERPOSE SUPPLEMENTAL PETITION

SIRS: Please take notice that upon the petition herein, filed this 21st day of August, 1929; the answers of the several defendants herein; the proposed supplemental petition hereto annexed, duly verified the 19th day of December, 1929; the annexed affidavit of Clarence H. Venner, Jr., sworn to the 19th day of December, 1929; and upon all the other pleadings, papers and proceedings had herein, the undersigned will move at a term of this Court for the hearing of motions, appointed to be held at the Court rooms in the old Post Office Building, in the Borough of Manhattan, City of New York, on the 24th day of December, 1929, at 10:30 A. M., or as soon thereafter as counsel can be heard, that the above named petitioner be granted leave to inter-[fol. 129] pose herein the supplemental petition hereto annexed; and for such other and further relief in the premises as may be just.

Dated New York, December 19, 1929.

Yours, etc., House, Grossman & Vorhaus, Attorneys for Petitioner. Office & Post Office Address: No. 521 Fifth Avenue, Borough of Manhattan, New York, N. Y.

To Elmer B. Collins, Esq., Special Assistant to the Attorney General, Solicitor for the United States of America, Washington, D. C.; Daniel W. Knowton, Esq., Solicitor for The Interstate Commerce Commission, Washington, D. C.; Jacob Aronson, Esq., Solicitor for defendant railroad companies, No. 466 Madison Avenue, New York City, N. Y.

[fol. 130] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF CLARENCE H. VENNER, JR.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Clarence H. Venner, Jr., being duly sworn, deposes and says:

I am the Vice-President of The New York Central Securities Corporation, the petitioner above named.

This suit was duly commenced by the filing of the petition herein in the office of the Clerk of this Court on the 21st day of August, 1929, and the service thereof on the defendant railroad corporations on or about the same day and on the defendants, The United States of America and The Interstate Commerce Commission on or about the 23rd day of August, 1929, and issue was duly joined herein by the service of the answer, respectively, of The United States of America on or about the 28th day of September, 1929, of The Interstate Commerce Commission on or about the 10th day of October, 1929, and of the defendant railroad com- [fol. 131] panies on or about the 15th day of October, 1929, as I am informed and verily believe.

This is a suit to annul and set aside an order of The Interstate Commerce Commission, made the 2nd day of July, 1929, whereby it was, among other things, provided that the acquisition by The New York Central Railroad Company of control of the railroad system of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, of the railroad system of The Michigan Central Railroad Company, and of the railroad properties of Chicago, Kalamazoo and Saginaw Railway Company, in accordance with the terms of the proposed leases set forth in the application of said New York Central Railroad Company, and on the conditions prescribed in the Commission's Reports in the proceedings upon said application, was thereby approved and authorized.

After the making of said order and on or about the 24th day of July, 1929, defendant, The New York Central Railroad Company, filed with The Interstate Commerce Commission its aplpication under Section 20-A of the Interstate Commerce Act for authority to assume obligation and liability, in respect of securities of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Michigan Central Railroad Company and Chicago, Kalamazoo and Saginaw Railway Company, respectively; and by said application, it was shown that the authority therein sought was to assume obligation and liability under and in accordance with the terms of the said proposed leases, respectively.

[fol. 132] Upon leave granted by the said Commission, the above named petitioner intervened and opposed said last mentioned application.

After the commencement of this suit and after joinder of issue therein and on the 2nd day of December, 1929, the Commission, after hearing upon said last mentioned application and upon issue tendered therein by this petitioner, made and entered its order, authorizing the defendant, The New York Central Railroad Company, to assume obligation and liability as lessee, in respect of certain securites of said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company and said The Michigan Central Railroad Company.

The petitioner herein feels aggrieved by the said last mentioned order, and inasmuch as the same is ancillary and supplemental to the aforesaid order of July 2nd, 1929, I ask that the petitioner be granted leave to interpose the annexed Supplemental Petition, duly verified by me, to the end that determination may be made herein, in respect as well of the said order of December 2nd, 1929, as of said order of July 2nd, 1929.

Clarence H. Venner, Jr.

Subscribed and sworn to before me this 19th day of December, 1929. Morris Schneider, Notary Public in and for County of Kings. Kings Co. Cl'k's No. 107. Kings Co. Reg. No. 217. New York County Clerk's No. 132. New York County Register's No. 0-218. Commission expires March 30th, 1930.

[fol. 133] In United States District Court

[Title omitted]

Supplemental Petition—Filed Dec. 24, 1929

To the Honorable the District Court of the United States in and for the Southern District of New York, sitting as a court of equity:

The above named Petitioner, The New York Central Securities Corporation, by this, its Supplemental Petition, respectfully shows unto this Honorable Court, and alleges:

1. After the making and entry of the final order, made and entered as alleged in the paragraph of the Petition

heretofore filed herein, numbered "26", and on the 24th day of July, 1929, the defendant, The New York Central Railroad Company, filed with the Interstate Commerce Commission, its application under Section 20-a of the Interstate Commerce Act, for the authority of the Commission to assume obligation and liability in respect of securities of the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company (hereinafter called the "Big Four"), The [fol. 134] Michigan Central Railroad Company (hereinafter called the "Michigan Central"), and Chicago, Kalamazoo and Saginaw Railway Company (hereinafter called the "Kalamazoo"), and of their leased lines. Said application was recorded in the Finance Docket of said Commission, No. 7744. A copy thereof is filed herewith, and by reference, made a part hereof.

2. By said application, Finance Docket 7744, it was shown that the Commission had theretofore made and entered its aforesaid order, dated July 2nd, 1929, in Finance Dockets Nos. 5690 and 5688, in which order it was provided, among other things, that the acquisition by the applicant of the control of the railroad systems of the Big Four, of the railroad system of the Michigan Central, and of the railroad properties of the Kalamazoo, in accordance with the terms of the proposed leases set forth in the application in said Finance Dockets Nos. 5690 and 5688, and on the conditions prescribed in the Commission's reports in said proceedings, was thereby approved and authorized; and that the authority sought by the applicant in said application, Finance Docket No. 7744, is to assume obligation and liability under and in accordance with the terms of the said proposed leases respectively, and in respect of the securities, as the same shall be outstanding at the effective date of the proposed leases respectively, and in said application described.

3. To the said application of The New York Central Railroa Company, Finance Docket 7744, Petitioner, upon leave granted, filed with the Commission, on or about the 26th [fol. 135] day of August, 1929, its intervening petition, for itself and also in behalf of the minority stockholders of said applicant and said Michigan Company, including Clarence H. Venner, C. H. Venner & Company (of which

he is the sole member), General Investment Company and Continental Securities Company, praying that the Commission should deny the said application, Finance Docket No. 7744.

4. Petitioner alleged in the said intervening petition before the Commission, and it here now alleges, that Section 8809 of the General Code of Ohio, in which state, among others, the New York Central and the Big Four are incorporated, and all the parties to said leases of the Big Four and Michigan Central own and operate railroad property therein demised, requires that in case of a lease of a railroad situate in whole or in part within that state, the rental reserved and secured to the lessor shall be equal at least to the lessor's net earnings for the fiscal year next preceding the one in which the lease is made; that the rental payable by the New York Central under the proposed leases of the Big Four and Michigan Companies, is far less than the net earnings of the Big Four and Michigan Companies for the calendar year 1928, being the last preceding fiscal year; and hence that the proposed leases are beyond the power of the Big Four, Michigan Central and the New York Central, and is for an unlawful object under the laws of the State of Ohio, and that under these circumstances, the Commission could not make the finding which by the express terms of said Section 20-a is made a condition of authorizing an assumption [fol. 136] by a carrier of obligation and liability, viz: that such assumption is for a lawful object within its corporate purposes.

5. Petitioner further alleges that after the commencement of this suit, and on the 2nd day of December, 1929, the Commission, after hearing upon the said application, Finance Docket No. 7744, and upon the issues tendered by said intervening petition, of this petitioner, made and entered its final order, authorizing the New York Central Railroad Company, to assume obligation and liability as lessee in respect of certain securities of the Michigan Central and Big Four. A copy of said final order is hereto annexed, marked Exhibit "B" and made a part hereof.

6. Petitioner, as a stockholder in each and all of said lessor and lessee companies, parties to said proposed leases of the Big Four and Michigan Central to the New York Cen-

tral, will be irreparably injured by the carrying out of the said last mentioned order of the Commission in the premises, and is without any full, complete and adequate remedy at law, and, therefore, prays for relief in this Court of equity.

Petitioner, therefore, prays for the following relief:

(a) That the defendants appear and answer this supplemental petition, but not under oath, their several answers under oath being hereby expressly waived.

(b) That the said order of the Interstate Commerce Commission, made and entered December 2nd, 1929, in Finance Docket No. 7744, be set aside and annulled, and the carry-
[fol. 137] ing out thereof be suspended by preliminary restraining order and interlocutory judgment, pending final decree herein, and on final hearing be permanently enjoined, and that the officers, directors, and agents of the New York Central, Big Four, and Michigan Central, be so enjoined from making effective and carrying out the said order.

(c) For relief as heretofore, in the original petition herein prayed.

(d) For such other and further relief in the premises as shall be agreeable to equity and good conscience.

Petitioner prays for the writ of injunction issued out of and under the seal of this Court, directed to said defendants, restraining them and each of them, during the pendency of this suit, as above prayed.

And Petitioner will ever pray, etc.

New York Central Securities Corporation, by Clarence H. Venner, Jr., Vice-Pres., Petitioner. House, Grossman & Vorhaus, Attorneys for Petitioner. Office & Post-office address: No. 521 Fifth Avenue, Borough of Manhattan, New York, N. Y. Joseph Fischer, of Counsel.

[fol. 138] *Duly sworn to by Clarence H. Venner, Jr. Jurat omitted in printing.*

[fol. 139] EXHIBIT "B" TO SUPPLEMENTAL PETITION

AT A SESSION OF THE INTERSTATE COMMERCE COMMISSION, DIVISION 4, HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE 2ND DAY OF DECEMBER, A. D. 1929

Finance Docket No. 7744

Assumption of Obligation and Liability by NEW YORK CENTRAL RAILROAD COMPANY

Finance Docket No. 7745

Assumption of Obligation and Liability by CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY

A hearing upon the application in Finance Docket No. 7744, and investigation of the matters and things involved in these proceedings having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That, pursuant to the terms of proposed leases set forth in its application and the report aforesaid, the New York Central Railroad Company be, and it is hereby, authorized to assume obligation and liability, as lessee, in respect of the securities shown in appendix A to the report herein, and in respect of the securities of other companies involved in said leases which may be issued by said companies, on or before the effective date of the proposed leases, pursuant to authority heretofore granted by this commission but not yet exercised.

It is further ordered, That, pursuant to the terms of the proposed leases set forth in its application and the report aforesaid, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company be, and it is hereby, authorized to assume obligation and liability, as lessee, in respect of the securities shown in appendix B to the report herein, and in respect of the securities of other companies involved in said leases which may be issued by said companies, on or before the effective date of the proposed leases, pursuant to authority heretofore granted by this commission, but not yet exercised.

It is further ordered, That, except as herein authorized, obligation and liability in respect of said securities shall

not be assumed by the applicants, or either of them, unless and until so ordered by this commission.

It is further ordered, That the applicants, or either one of them acting for both, shall report concerning the matters herein involved in conformity with the commission's order dated February 19, 1927, respecting applications filed under section 20a of the interstate commerce act; said report or reports to include any securities, in respect of which the applicants assume obligation and liability that may be issued between the date of this order and the effective date [fol. 140] of the proposed leases.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said securities, or dividends or interest thereon, on the part of the United States.

And it is further ordered, That this order shall become effective 30 days from its date.

By the Commission, Division 4.

George B. McGinty, Secretary. (Seal.)

[File endorsement omitted.]

Service admitted.

Motion granted. Order to be settled upon one day's notice if not agreed upon.

Alfred C. Coxe, U. S. D. J.

Dec. 24, 1929.

[fol. 141] Exhibit to Supplemental Petition

Before the Interstate Commerce Commission

Application of The New York Central Railroad Company, under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability in Respect of Securities of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Michigan Central Railway Company, and Chicago, Kalamazoo and Saginaw Railway Company, Respectively

Now comes The New York Central Railroad Company and files this its application under Section 20a of the Interstate Commerce Act for the authority of the Commission to assume obligation and liability with respect of securities of The Cleveland, Cincinnati, Chicago and St. Louis Rail-

way Company, hereinafter called the Big Four, The Michigan Central Railroad Company, hereinafter called the Michigan Central, and Chicago, Kalamazoo and Saginaw Railway Company, hereinafter called the Kalamazoo, and of their leased lines as hereinafter set forth.

The applicant shows that the Commission has heretofore made and entered its order dated July 2, 1929 in Finance Dockets Nos. 5690 and 5688 upon due application by the applicant in which order it was provided, among other things, that the acquisition by the applicant of control of the railroad systems of the Big Four, including all right, title and interest of that company in the properties of The Cincinnati Northern Railroad Company, hereinafter called the Northern, the Evansville, Indianapolis & Terre Haute Railway Company, hereinafter called the Evansville, The Peoria and Eastern Railway Company and the Kankakee and Seneca Railroad Company, of the railroad system of the Michigan Central, and of the railroad properties of the Kalamazoo in accordance with the terms of the proposed leases set forth in the application and upon the conditions [fol. 142] prescribed in the Commission's reports in said proceedings was thereby approved and authorized.

In said proposed leases, respectively, the applicant as lessee covenants and agrees to pay to the lessor, its successors or assigns, or for account of the lessor, as rent for the demised premises and as consideration for the transfer and assignment therein made, among other payments, as and when they shall fall due:

the several installments of interest (including amounts applicable to interest or fixed dividends under equipment trusts) accruing during the term of the lease upon any and all bonds, notes and other obligations or evidences of indebtedness (hereinafter collectively called the lessor's obligations) heretofore issued, incurred or assumed by the lessor and now outstanding, and any extensions thereof; (paragraph (3) of Art. II of each lease);

an amount, in the case of the Big Four, quarter-annually equal to $1.25 on each share of the preferred stock, and semi-annually equal to $5 on each share of the common stock; in the case of the Michigan Central semi-annually equal to $25 on each share, and in the case of the Kalamazoo semi-annually equal to $3 on each share, of the cap-

ital stock of the lessor from time to time outstanding, to be paid by the lessee for account of the lessor to or upon the order of stockholders of record of the lessor, except that no such payment shall be made with respect to capital stock from time to time registered in the name of the lessee or of a corporate predecessor or successor of the lessee or of a nominee of the lessee or of any such corporate successor, subject in the case of the Michigan Central to the special provisions of the proposed Michigan Central lease with respect to compliance with the terms of a certain collateral trust indenture therein referred to.

(Paragraph (5) of Art. II of each lease.)

It is further provided in said proposed leases that the lessee shall, subject to reimbursement by the lessor as in the leases provided, pay, redeem or otherwise acquire, or renew, extend or refund as and when they shall become due and payable (during the term of the lease) the lessor's [fol. 143] obligations, including installments representing the principal of the lessor's obligations under equipment trusts, (Big Four lease, Art. X, Section 3; Michigan Central lease, Art. IX, Section 3 and Kalamazoo lease, Art. VII, Section 3).

Furthermore, in the said proposed leases, respectively, the lessee covenants that it will during the term of the leases, among other things, perform and observe or cause to be performed and observed all the valid covenants, terms and conditions to be performed and observed by the lessor or assumed by or chargeable to it under any lease or any trackage right, easement, license, grant, contract, leasehold or ordinance right referred to therein or under any mortgages or equipment trust agreements or under any other contracts of whatsoever kind theretofore entered into or assumed or accepted by the lessor and then in force. (Big Four lease, Art. VII, Section 1 (a); Michigan Central lease, Art. VI, Section 1 (a), and Kalamazoo lease, Art. V, Section 1 (a)).

The authority herein sought by the applicant is to assume obligation and liability under and in accordance with the terms of the said proposed leases, respectively, in respect of securities as the same shall be outstanding at the effective date of the proposed leases, respectively, described as follows:

(1) Capital stock of the Big Four, the Michigan Central, and the Kalamazoo; also capital stock of the Northern and of the Evansville (the lines of which companies are to be leased to the Big Four and the leasehold assigned to the applicant under the proposed Big Four lease) and of other companies in respect of the capital stock of which the Big Four, the Michigan Central and the Kalamazoo, respectively, has, or shall have, at the effective date of the proposed leases, by the terms of a lease or operating or [fol. 144] other agreement or instrument, assumed obligation or liability which under and by the terms of said proposed leases to the applicant is provided to be assumed by the applicant;

(2) The lessor's obligations, as hereinbefore described;

(3) Bonds, notes, and other obligations and evidences of indebtedness of the Northern and of the Evansville and of other companies in respect of which the Big Four, the Michigan Central and the Kalamazoo, respectively, has, or shall have, at the effective date of the proposed leases, by the terms of a lease or operating or other agreement or instrument, assumed obligation or liability which under and by the terms of said proposed leases is provided to be assumed by the applicant.

A statement of the securities to which this application relates, as the same are now outstanding, is attached hereto and made a part hereof.

1. The exact corporate name of the applicant is The New York Central Railroad Company.

2. The names, titles and post-office addresses of the applicant's President, Vice-President (Finance and Corporate Relations), Secretary, Principal Attorney and Comptroller, are as follows:

Name	Title	Post-office address
P. E. Crowley	President	230 Park Avenue, New York City.
A. H. Harris	Vice-President (Finance & Corporate Rels.)	do.
E. F. Stephenson	Secretary	do.
Robt. J. Cary	Vice-President and General Counsel (Applicant's principal attorney)	466 Lexington Avenue, New York City.
W. C. Wishart	Comptroller	do.

[fol. 145] 3. The applicant was organized and now exists under the laws of the states of New York, Pennsylvania, Ohio, Indiana, Illinois and Michigan. It was created by consolidation of The New York Central and Hudson River Railroad Company, The Lake Shore and Michigan Southern Railway Company, and others, under an agreement dated April 29, 1914, which was approved by orders of the Public Service and other Commissions of the several states having jurisdiction, and duly filed in the offices of the Secretary of State of the several states of incorporation in accordance with the laws thereof.

4. The applicant operates lines of railroad in the states of New York, New Jersey, Massachusetts, Pennsylvania, Ohio, Indiana, Illinois, Michigan, West Virginia, and in the Dominion of Canada.

5. The nature of the application and the purposes and uses of the proposed assumption of obligation and liability has hereinbefore been set forth.

6-7-8. These features are fully covered by the proceedings in Finance Dockets Nos. 5690 and 5688.

There are attached hereto or referred to as a part hereof, as indicated, the following papers:

(1) Certified copy of the consolidation agreement under which the applicant was formed has heretofore been filed with the Commission in connection with the applicant's prior application, No. 20a-20, Finance Docket No. 39, to which reference is hereby made.

(2) Certified copy of the by-laws of the applicant, containing all amendments to date, has heretofore been filed with the Commission in connection with the applicant's prior application dated May 31, 1928, Finance Docket No. 6935, to which reference is hereby made.

(3) Certified copy of resolutions adopted, respectively, by the Board of Directors and the Stockholders of the applicant authorizing the making of the proposed leases [fol. 146] whereby the assumption of obligations and liabilities herein referred to will be made were filed in Finance Dockets Nos. 5690 and 5688, to which reference is hereby made.

(4) Certified copy of resolution of the Executive Committee of the applicant's Board of Directors designating by name and for that purpose the executive officer by whom this application is signed, verified and filed is hereto attached.

(5) Opinion of counsel as to the lawfulness of the proposed assumption of obligations and liabilities is attached.

(6) Maps of the railroads of the applicant and of the Big Four, the Michigan Central and the Kalamazoo were filed in connection with the proposed leases in Finance Dockets Nos. 5690 and 5688.

(7) Forms of stock certificates herein involved are filed herewith. Forms of bonds, notes, equipment trust certificates, etc., herein involved are set forth in the mortgages, indentures or other agreements herewith filed, or referred to as previously filed in the statement thereof hereinafter referred to.

(8) Copies of mortgages, indentures and other agreements under which securities herein involved were issued are hereto attached or referred to as having been previously filed as indicated in the accompanying statement.

Copies of leases or other agreements under which obligation or liability in respect of securities of another was assumed by proposed lessor companies in cases where such assumption is to be taken over by the applicant under the proposed leases are filed herewith. Statement of same is attached hereto.

(9) Verified copy of general balance sheet of the appli- [fol. 147] cant of the latest practicable date is attached.

The filing of this application should not be taken as an admission on the part of the applicant that any of the covenants or agreements in said proposed leases contained constitute an assumption of obligation or liability with respect to the securities of another within the meaning of Section 20a of the Interstate Commerce Act or that any further authority from the Commission is required in order that the applicant may lawfully execute and deliver said leases, but if the Commission shall deem that it may properly proceed in the exercise of jurisdiction in the premises the applicant

prays that it enter its Order under said Section of the Act granting its authorization in the premises.

The New York Central Railroad Company, by Albert H. Harris, Vice-President.

New York, N. Y., July 24, 1929.

[fol. 148] Verification

STATE OF NEW YORK,
County of New York, ss:

Albert H. Harris makes oath and says that he is Vice-President of The New York Central Railroad Company; that he has carefully examined each and all of the statements contained in the foregoing application, and that they are true and correct to the best of his knowledge and belief.

Albert H. Harris.

Sworn to and subscribed before me, a Notary Public in and for the State and County aforesaid, this 24 day of July, 1929. R. D. McCraney, Notary Public, Westchester County, N. Y. Certificate filed in New York County. New York County Clerk's No. 175. New York County Register's No. 1Mc131. Certificate filed in Herkimer County. My commission expires March 30, 1931. (Notarial Seal.)

[fol. 149] At meetings of the respective Executive Committees of the Boards of Directors of the following named companies, held Grand Central Terminal, in the City of New York, N. Y., on the respective dates given, pursuant to due notice given each member and at which meetings quorums were present:

The New York Central Railroad Company—July 14, 1920.

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company—July 28, 1920.

Inter alia, the following was adopted by the unanimous vote of those present:

Resolved: That A. H. Smith, President, Albert H. Harris, Vice-President, J. Carstenson, Vice-President, and W. C. Wishart, Comptroller, and each or any of them be, and they are hereby, designated and authorized, effective June 28, 1920, for and on behalf of this company—and in its name and under its corporate seal (which may be attested,

if required by E. F. Stephenson, Secretary, or J. M. O'Mahoney, Assistant Secretary) or otherwise as may be proper or required—to make, sign, verify and file with the Interstate Commerce Commission, from time to time, applications in such form as may be prescribed by the Commission, or as may be proper, for the authority of the Commission under Section 20a of the Interstate Commerce Act, in all cases where required by law, in respect to the issue of securities by the company or the assumption by it of any obligation or liability as lessor, lessee, guarantor, indorser, surety or otherwise, in respect of the securities of any other person, natural or artificial, and in all cases where required by law to make, sign, verify and file Certificates of Notification under said section of said act, in such form as may be prescribed by the Commission or as may be proper.

Further resolved: That the said officers of this company and each or any of them be, and they are hereby, authorized, effective June 28, 1920, to execute all such papers, make all such affidavits and do such other acts and things as may be necessary or appropriate in respect to said applications and said certificates of notification and for the carrying out of these resolutions.

I, Edward F. Stephenson, Secretary of The New York Central Railroad Company and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, do hereby certify the foregoing to be a correct copy of resolutions duly adopted by the respective Executive Committees of the Boards of Directors of the said companies, at meetings held as above stated.

Witness my hand and the corporate seals of said companies at New York, N. Y., this 24 day of July, 1929.

E. F. Stephenson. (Corporate Seal.)

[fol. 150] In re Application of The New York Central Railroad Company, under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability in Respect of Securities of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Michigan Central Railroad Company, and The Chicago, Kalamazoo and Saginaw Railway Company, Respectively

I am Counsel for the New York Central Railroad Company and am familiar with the matters to which the above-mentioned application relates.

I am of the opinion that the proposed assumption by The New York Central Railroad Company of obligation and liability in respect of securities of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Michigan Central Railroad Company, The Chicago, Kalamazoo and Saginaw Railway Company, The Cincinnati Northern Railroad Company and Evansville, Indianapolis and Terre Haute Railway Company and of other companies as set forth in said application, is for a lawful object within the corporate purposes of said Company, and compatible with the public interest, which is necessary or appropriate for and consistent with the proper performance by the said Company of service to the public as a common carrier, and which will not impair its ability to perform that service, and that the proposed assumption of obligation and liability in respect to securities of the said companies is reasonably necessary and appropriate for said purpose, and that such assumption of obligation and liability will be legally authorized and valid if approved by the Interstate Commerce Commission.

Respectfully, John K. Graves.

New York, N. Y., July 24, 1929.

[fol. 151]

Application of THE NEW YORK CENTRAL RAILROAD COMPANY, under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability in Respect of Securities of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Michigan Central Railroad Company, and Chicago, Kalamazoo and Saginaw Railway Company, Respectively

Statement of Instruments under Which Obligations Involved in This Application, as Set Forth on Accompanying Statement Thereof, Were Issued

Cleveland, Cincinnati, Chicago and St. Louis Railway Co.

Mortgages and Indentures under Which Bonds Were Issued

Issuing company	Description	Date of instrument	No. of copies filed herewith or reference to previous filing
Cincinnati, Indianapolis, St. Louis & Chicago Ry. Co.	General First Mortgage	August 2, 1886	2
		(Feb. 1, 1887, Supp.)	2
C., C., C., & St. L. Ry. Co.	Refunding & Improvement Mortgage.	June 27, 1919	F. D. #1086
C., C., C., & St. L. Ry. Co.	Agreement relating to European Loan Bonds.	May 14, 1910	F. D. #1266
C., C., C., & St. L. Ry. Co.	Agreement relating to 20-yr. Gold Debentures.	Jan. 1, 1911	3
C., C., C., & St. L. Ry. Co.	General Mortgage	May 15, 1893	3
C., C., C., & St. L. Ry. Co.	C. V. & C. Div. First Mort.	Jan. 1, 1890	No copy available.
C., C., C., & St. L. Ry. Co.	C. & W. M. Div. First Mort.	Apr. 1, 1891	3

[fol. 152]

C., C., C., & St. L. Ry. Co.	White Water Valley Div. First Mort.	Nov. 1, 1890	2

Issuing company	Description	Date of instrument	No. of copies filed herewith or reference to previous filing
C., C., C., & St. L. Ry. Co.....	C. I. & St. L. Short Line Ry. Co. 1st Mort.	Apr. 1, 1903.....	2
C., C., C., & St. L. Ry. Co.....	Springfield & Columbus Div. Indenture seduring 1st Collateral Trust, St. Louis Div.	Oct. 30, 1890.....	3
C. I., St. L. & C. Ry. Co.....	Real Estate Mtge. Rachael G. Holmes.	Nov. 16, 1882.....	No copy available.
Equipment Trusts:			
C., C., C., & St. L. Ry. Co.....	Equipment Trust No. 44.....	Jan. 15, 1920.....	3
C., C., C., & St. L. Ry. Co. and other companies.	N. Y. C. Lines 5% Equip. Trust of 1922.	June 1, 1922.....	F. D. #2444
C., C., C., & St. L. Ry. Co. and other companies.	N. Y. C. Lines 4½% Equip. Trust of 1922.	Sept. 1, 1922.....	F. D. #2617
C., C., C., & St. L. Ry. Co. and other companies.	N. Y. C. Lines Eq. Trust of 1923.	June 1, 1923.....	F. D. #2973
C., C., C., & St. L. Ry. Co. and other companies.	N. Y. C. Lines 5% Equip. Trust of 1924.	June 1, 1924.....	F. D. #3596
C., C., C., & St. L. Ry. Co. and other companies.	N. Y. C. Lines 4½% Equip. Trust of 1924.	Sept. 15, 1924.....	F. D. #4321
C., C., C., & St. L. Ry. Co. and other companies	N. Y. C. Lines 4½% Equipment Trust of 1925.	May 15, 1925.....	F. D. #4804

[fol. 153] Leased or Operated Railway Properties (or to be Leased)—and Terminal Properties

Issuing company	Description	Date of instrument	No. of copies filed herewith or reference to previous filing
Mortgages			
Cincinnati Northern R. Co.	First Mortgage	Sept. 23, 1901	Filed with C., C., C. & St. L. 20a App'n of even date.
Evansville, Mt. Carmel & Northern Ry. Co.	First Mortgage	Nov. 1, 1910	3
Ohio, Indiana & Western (Peoria & Eastern Ry. Co.)	First Preferred Mortgage	April 2, 1888	3
Indiana, Bloomington & Western Ry. Co. (Peoria & Eastern Ry. Co.)	First Preferred Mortgage	April 15, 1879	3
Peoria & Eastern Ry. Co.	First Consolidated Mortgage	Feb. 22, 1890	3
Terminal R. R. Ass'n. of St. Louis	General Mortgage	Dec. 16, 1902	F. D. 7314
L. & J. Bridge & R. Co.	First Mortgage	Jan. 1, 1895	F. D. 1111
L. & J. Bridge & R. Co.	Guaranty		F. D. 6764
Indianapolis Union Ry. Co.	General & Ref. Mort	Jan. 1, 1915	F. D. 2725
Indianapolis Union Ry. Co.	Guaranty		F. D. 2725
Equipment Obligations			
Cincinnati Northern R. Co.	N. Y. C. Lines 5% Eq. Tr. of 1922.	June 1, 1922	F. D. 2444
Cincinnati Northern R. Co.	N. Y. C. Lines 5% Equip. Trust of 1924.	June 1, 1924	3

[fol. 154] Michigan Central Railroad Co.

Issuing company	Description	Date of instrument	No. of copies filed herewith or reference to previous filing
Michigan Central R. Co	First Mtge	May 1, 1902	3
Michigan Central R. Co	Grand River Valley 1st Mortgage.	Sept. 1, 1909	3
Michigan Central R. Co	Detroit & Bay City 1st Mortgage.	March 10, 1881	1
Kalamazoo & South Havem Ry. Co.	First Mortgage	March 22, 1889	1
Jackson, Lansing & Saginaw R. Co.	First Mortgage	August 1, 1901	Copies can be made if necessary.
Michigan Central R. Co	Michigan Air Line Ry. 1st Mortgage.	October 17, 1889	2
Michigan Central R. Co	Joliet & Northern Indiana R. Co. 1st Mortgage.	July 10, 1907	3
Bay City & Battle Creek Ry. Co.	First Mortgage	Dec. 1, 1889	No copy available.
Toledo, Canada Southern & Detroit Ry. Co.	First Mortgage	Jan. 2, 1906	3
Michigan Central R. Co	Refunding & Improvement Mortgage.	Jan. 1, 1917	F. D. 1085
Michigan Central R. Co	Equipment Trust of 1915— 5%	October 1, 1915	3
Michigan Central R. Co	Equipment Trust of 1917— 6%	March 1, 1917	3

New York Central R. Co.	Equipment Trust of 1920—7%	April 15, 1920	3
[fol. 155]			
Michigan Central R. Co. and other companies.	N. Y. C. Lines 4½% Equip. Trust of 1922.	Sept. 1, 1922	F. D. #2617
Michigan Central R. Co. and other companies.	N. Y. C. Lines 4½% Equip. Trust of 1923.	June 1, 1923	F. D. #2973
Michigan Central R. Co. and other companies.	N. Y. C. Lines 5% Equip. Trust of 1924.	June 1, 1924	F. D. #3596
Michigan Central R. Co. and other companies.	N. Y. C. Lines 4½% Equip. Trust of 1924.	Sept. 15, 1924	F. D. #4321
Michigan Central R. Co. and other companies.	N. Y. C. Lines Equip. Trust of 1925.	May 15, 1925	F. D. #4804
Battle Creek & Sturgis Ry. Co.	First Mortgage	Dec. 1, 1889	No. copy available
Canada Southern Ry. Co.	1st & Ref. Mort. & Supp.	Oct. 1, 1912	3
Detroit River Tunnel Co.	First Mortgage	May 1, 1911	3
Lansing Mfg. R. R. Co.	First Mortgage	July 1, 1905	1
Canada Southern Ry. Co.	Leamington & St. Clair Ry. 1st Mort.	Oct. 1, 1912	3
Toledo Terminal R. Co.	First Mortgage	Nov. 1, 1907	F. D. #2279
	Chicago, Kalamazoo and Saginaw Ry. Co.		
Chicago, Kalamazoo & Saginaw Ry. Co.	First Mortgage	July 1, 1909	3

[fol. 156] Application of THE NEW YORK CENTRAL RAILROAD COMPANY, under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability in Respect of Securities of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Michigan Central Railroad Company, and Chicago, Kalamazoo and Saginaw Railway Company, Respectively

Statement Setting Forth List of Stock Certificates—Forms of Which are Filed Herewith—Relating to Stock with Respect to Which Obligation or Liability is to be Assumed by the Applicant

	Number of copies filed
The Cincinnati, Sandusky & Cleveland Railroad Company—Common	15
The Cincinnati, Sandusky & Cleveland Railroad Company—Preferred	15
Cincinnati Northern Railroad Company—Common	15
Evansville, Indianapolis & Terre Haute Ry. Co.—Common	15
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.—Common and Preferred	15
Chicago, Kalamazoo & Saginaw Ry. Co.—Common	15
Detroit River Tunnel Co.—Common	15
Canada Southern Railway Co.—Common	15
Michigan Central Railroad Co.—Common	15

[fol. 157] Application of THE NEW YORK CENTRAL RAILROAD COMPANY, under Section 20a of the Interstate Commerce Act, for authority to Assume Obligation and Liability in Respect of Securities of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Michigan Central Railroad Company, and Chicago, Kalamazoo and Saginaw Railway Company, Respectively

Statement of Leases and Other Agreements Containing Obligation or Liability of Lessor or Other Companies to be Assumed by the Applicant under Proposed Leases

	No. of copies filed or reference to previous filing
Lease of Evansville, Mount Carmel & Northern to C., C., C., & St. L., dated Nov. 1, 1910...	3
Resolution to Board of Directors of C., C., C., & St. L., dated Sept. 15, 1880, relating to Cincinnati, Lafayette & Chicago R. R. Co.....	3
Lease of Cincinnati, Sandusky & Cleveland R. R. Co. to C., C., C., & St. L., dated Nov. 28, 1870, and amendment thereto dated March 25, 1872.	Amendment not available
Contract between Columbus, Hope and Greensburg R. R. Co. and C., C., C., & St. L., dated Oct. 17, 1891.....	3
Contract between Vernon, Greensburg and Rushville R. R. Co. and C., C., C., & St. L., dated Oct. 17, 1891.....	3
Operating Agreement, Battle Creek and Sturgis Ry. Co. to Michigan Central, dated February 1, 1890.....	3
Lease of Canada Southern Ry. Co. to Michigan Central, dated August 15, 1903.....	3
Lease and Supplemental Agreement between Detroit River Tunnel Co. and Michigan Central, dated December 19, 1906, and June 10, 1926, respectively.....	3
Agreement between Michigan Central R. Co. and others relating to Toledo Terminal R. Co., dated Nov. 1, 1907.....	3
Agreement between Detroit Terminal R. R. Co. and Michigan Central, dated Feb. 12, 1906, and amendment thereto dated June 21, 1919...	2
Agreement between C., C., C., & St. L., Terminal R. R. Ass'n of St. Louis and others, dated Dec. 16, 1902.....	F. D. #7314

[fol. 158] Application of THE NEW YORK CENTRAL RAILROAD COMPANY, under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability in Respect of Securities of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Michigan Central Railroad Company, and Chicago, Kalamazoo and Saginaw Railway Company Respectively

W. C. Wishart, Comptroller of The New York Central Railroad Company, makes oath and says that the balance

sheet of said Company as of May 31st, 1929, a copy of which is hereto attached, and the statement of securities as of July 23, 1929, copy of which is hereto attached, are true and correct statements of the matters and things therein set forth.

(Signed) W. C. Wishart.

New York, N. Y., July 24, 1929.

Sworn to and subscribed before me this 24th day of July, 1929. (Signed) J. H. West, Notary Public, Westchester County. N. Y. Co. Clk's No. 32, Reg. No. 0-71. Term expires March 30, 1930. (Notarial Seal.)

New York Central Railroad Company

Condensed General Balance Sheet as of May 31, 1929

Assets

Investments:		
Investment in road and equipment	$1,010,296,000.98	
Improvements on leased railway property	135,968,896.73	
Deposits in lieu of mortgaged property sold	45,582.06	
Miscellaneous physical property	29,809,196.50	
Investments in affiliated companies	283,101,970.95	
Other investments	52,195,597.63	
Total Investments		$1,511,417,244.85
Current Assets:		
Cash	$37,112,978.58	
Special deposits	4,196,700.73	
Loans and bills receivable	1,629,031.48	
Traffic and car-service balances receivable	2,276,710.88	
Net balance receivable from Agents and Conductors	4,652,679.23	
Miscellaneous accounts receivable	12,340,455.51	
Material and supplies	32,297,764.91	
Interest and dividends receivable	8,039,016.41	
Other current assets	696,517.45	
Total Current Assets		103,241,855.18
Deferred Assets:		
Working fund advances	$193,071.03	
Insurance and other funds	4,218,706.38	
Other deferred assets	1,076,086.09	
Total Deferred Assets		5,487,863.50
Unadjusted Debits:		
Rents and insurance premiums paid in advance	$483,009.01	
Discount on funded debt	11,028,488.83	
Other unadjusted debits	18,446,721.26	
Securities issued or assumed—Unpledged ($4,494,005.00)		
Total Unadjusted Debits		29,958,219.10
Securities acquired from lessor companies		125,001.00
Total Assets		$1,650,230,183.63

[fol. 160]

New York Central Railroad Company

Condensed General Balance Sheet as of May 31, 1929

Liabilities

Stock:		
Capital stock	$463,559,235.00	
Premium on capital stock	4,647,825.90	
Total Capital Stock		$468,207,060.90
Long Term Debt:		
Equipment obligation	65,210,203.98	
Mortgage bonds	547,951,000.00	
Miscellaneous obligations	17,597,200.00	
Total Long Term Debt		630,758,403.98
Current Liabilities:		
Traffic and car-service balances payable	6,864,862.12	
Audited accounts and wages payable	23,278,960.50	
Miscellaneous accounts payable	2,606,089.47	
Interest matured unpaid	2,116,734.23	
Dividends matured unpaid	238,207.78	
Funded debt matured unpaid	159,090.00	
Unmatured interest accrued	5,351,935.51	
Unmatured rents accrued	4,229,439.73	
Other current liabilities	5,905,334.67	
Total Current Liabilities		50,750,654.01
Deferred Liabilities:		
Other deferred liabilities		26,142,212.08
Unadjusted Credits:		
Tax Liability	15,292,786.56	
Insurance and casualty reserves	1,819,554.82	
Operating reserves	1,015,552.93	
Accrued depreciation—Road	1,944,011.36	

Accrued depreciation—Equipment	131,410,471.39	
Accrued depreciation—Miscellaneous physical property	1,644,568.71	
Other unadjusted credits	28,669,007.44	
Total Unadjusted Credits		181,795,953.21
Corporate Surplus:		
Additions to property through income and surplus	1,485,141.62	
Miscellaneous fund reserves	1,667,865.87	
Profit and loss—Balance	289,297,890.96	
Total Corporate Surplus		292,450,898.45
Securities acquired from lessor companies		125,001.00
Total Liabilities		$1,650,230,183.63

(Here follows statement of securities, side folios 161-165)

[fol. 161] Application of the New York Central Railroad Company under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability in R and St. Louis Railway Company, The Michigan Central Railroad Company, and Chicago, Kalamazoo and Saginaw Railway C

Statement of Securities—as of July 23, 1929

Lines Leased or Proposed to be Leased

		Date of maturity	Held by or f the compan
Cleveland, Cincinnati, Chicago and St. Louis Railway Company:			
Capital Stock of: Common		.....	$6,500.
Preferred		.....	1,500.
Mortgage Bonds of:			
Cincinnati, Indianapolis, St. Louis & Chicago Ry. Co	General First Mortgage Bonds	8/ 1/1936	317,000.
Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co	General Consolidated Mortgage Bonds	1/ 1/1934	.....
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	Refunding & Improvement Mtg. Bonds, Series "C"	1/ 1/1941	.....
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	Refunding & Improvement Mtg. Bonds, Series "D"	7/ 1/1963	.....
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	Refunding & Improvement Mtg. Bonds, Series "E"	7/ 1/1977	.....
20-Year European Loan Bonds (Francs)		6/ 1/1930	F
20-Year Gold Debentures		1/ 1/1931	.....
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	General Mortgage Gold Bonds 4%	6/ 1/1993	.....
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	General Mortgage Gold Bonds 5%	6/ 1/1993	.....
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. (C. V. & C. Division)	First Mortgage Bonds	1/ 1/1939	.....
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. (C. & W. M. Division)	First Mortgage Bonds	7/ 1/1991	.....
Cleveland, Cincinnati, Chicag & St. Louis Ry. Co. (W. W. Division)	First Mortgage Bonds	7/ 1/1940	.....
Chicago, Indianapolis & St. Louis Short Line Ry. Co	First Mortgage Bonds	4/ 1/1953	.....
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. (S. & C. Division)	First Mortgage Bonds	9/ 1/1940	230.
Collateral Trust Bonds of:			
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. (St. Louis Division)	First Collateral Trust Bonds	11/ 1/1990	1,357,000.
Miscellaneous Obligations of:			
5% Note favor Rachel G. Holmes	Promissory Note	4/ 1/1930	.....
5% Mortgage Bond favor Rachel G. Holmes	Mortgage Bond	6/30/1930	.....

	Carrier Obligated–or Carriers jointly & severally obligated	Total issued	Date of maturity	Total outstanding
Equipment Obligations of:				
Equipment Trust No. 44, 6% Equipment Trust Certificates of 1920	C., C., C., & St. L. Ry. Co	$5,195,800.00	1/15/1930–1935	$2,080,200.
New York Central R. R. Co. 7% Equipment Trust Certificates of April 15, 1920	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co., P. & L. E. R. R. Co., T. & O. C. Ry. Co.	36,225,000.00	1/15/1930–1935	14,490,000.
New York Central Lines 5% Equipment Trust Certificates of June 1, 1922	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co., C. N. R. R. Co., P. & L. E. R. R. Co., P. McK. & Y. R. R. Co	27,645,000.00	6/ 1/1930–1937	14,744,000.

y under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability in Respect of Securities of The Cleveland, Cincinnati, Chicago y Company, The Michigan Central Railroad Company, and Chicago, Kalamazoo and Saginaw Railway Company, Respectively

Statement of Securities—as of July 23, 1929

Lines Leased or Proposed to be Leased

		Date of maturity	Held by or for the company	Outstanding	Owned by applicant	Balance outstanding not owned by applicant
.....	.....	.....	$6,500.00	$47,028,800.00	$42,941,100.00	$4,087,700.00
.....	.....	.....	1,500.00	9,998,500.00	8,468,100.00	1,530,400.00
.....	General First Mortgage Bonds	8/ 1/1936	317,000.00	5,867,000.00	.....	5,867,000.00
.....	General Consolidated Mortgage Bonds	1/ 1/1934	.....	3,205,000.00	.....	3,205,000.00
.....	Refunding & Improvement Mtg. Bonds, Series "C"	1/ 1/1941	.....	1,052,600.00	.....	1,052,600.00
.....	Refunding & Improvement Mtg. Bonds, Series "D"	7/ 1/1963	.....	20,000,000.00	684,000.00	19,316,000.00
.....	Refunding & Improvement Mtg. Bonds, Series "E"	7/ 1/1977	.....	15,000,000.00	303,000.00	14,697,000.00
.....	.....	6/ 1/1930	Fcs.	50,000,000.00A	43,846,500.00 B	6,153,500.00
.....	.....	1/ 1/1931	.....	$5,000,000.00	$ 466,000.00	$ 4,534,000.00
.....	General Mortgage Gold Bonds 4%	6/ 1/1993	.....	28,579,000.00	1,066,000.00	27,513,000.00
.....	General Mortgage Gold Bonds 5%	6/ 1/1993	.....	4,161,000.00	.....	4,161,000.00
n).....	First Mortgage Bonds	1/ 1/1939	.....	5,000,000.00	.....	5,000,000.00
on).....	First Mortgage Bonds	7/ 1/1991	.....	4,000,000.00	72,000.00	3,928,000.00
.....	First Mortgage Bonds	7/ 1/1940	.....	650,000.00	.....	650,000.00
.....	First Mortgage Bonds	4/ 1/1953	.....	3,000,000.00	5,000.00	2,995,000.00
.....	First Mortgage Bonds	9/ 1/1940	230.00	1,103,500.00	.....	1,103,500.00

A—Owned by C., C., C., & St. L. Ry.
B–Outstanding–Not Owned by C., C., C., & St. L. Ry.

.....	First Collateral Trust Bonds	11/ 1/1990	1,357,000.00	8,643,000.00	161,000.00	8,482,000.00
.....	Promissory Note	4/ 1/1930	.....	3,425.00	.....	3,425.00
.....	Mortgage Bond	6/30/1930	.....	9,000.00	.....	9,000.00

	Carrier Obligated–or Carriers jointly & severally obligated	Total issued	Date of maturity	Total outstanding	C., C., C., & St. L. Ry. Co's. proportion outstanding
.....	C., C., C., & St. L. Ry. Co....	$5,195,800.00	1/15/1930–1935	$2,080,200.00	$2,080,200.00
15, 1920....	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co., P. & L. E. R. R. Co., T. & O. C. Ry. Co.	36,225,000.00	1/15/1930–1935	14,490,000.00	4,566,668.40
23.....	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co., C. N. R. R. Co., P. & L. E. R. R. Co., P. McK. & Y. R. R. Co	27,645,000.00	6/ 1/1930–1937	14,744,000.00	3,000,000.00

[fol. 162] Application of the New York Central Railroad Company under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability in Res and St. Louis Railway Company, the Michigan Centrail Railroad Company, and Chicago, Kalamazoo and Saginaw Railway Co

Statement of Securities—as of July 23, 1929—Continued

Lines Leased or Proposed to be Leased

Cleveland, Cincinnati, Chicago and St. Louis Railway Company:

Equipment Obligations of—Continued:	Carrier obligated—or Carriers jointly & severally obligated	Total issued	Date of maturity	Total outstanding
New York Central Lines 4½% Equipment Trust Certificates of September 1, 1922	N. Y. C. R. R. Co., M. C. R. R. Co., C. C. C. & St. L. Ry. Co.	$12,660,000.00	9/ 1/1929-1937	$7,596,000.00
New York Central Lines 5% Equipment Trust Certificates of June 1, 1923	N. Y. C. R. R. Co., M. C. R. R. Co., C. C. C. & St. L. Ry. Co.	17,340,000.00	6/ 1/1930-1938	10,404,000.00
New York Central Lines 5% Equipment Trust Certificates of June 1, 1924	N. Y. C. R. R. Co., M. C. R. R. Co., C. C. C. & St. L. Ry. Co., C. N. R. R. Co.	25,050,000.00	6/ 1/1930-1939	16,700,000.00
New York Central Lines 4½% Equipment Trust Certificates of September 15, 1924	N. Y. C. R. R. Co., M. C. R. R. Co., C. C. C. & St. L. Ry. Co.	20,955,000.00	9/15/1929-1939	15,367,000.00
New York Central Lines 4½% Equipment Trust Certificates of May 15, 1925	N. Y. C. R. R. Co., M. C. R. R. Co., C. C. C. & St. L. Ry. Co.	21,702,000.00	5/15/1930-1940	16,500,000.00

Cleveland, Cincinnati, Chicago and St. Louis Railway Company Securities of Lines Leased or Proposed to be Leased:

		Date of maturity	Held by or for the company
Leased Railway Properties—Stock of:			
The Cincinnati, Sandusky and Cleveland R. R. Co	Common	.....	.....
	Preferred	.....	.....
Cincinnati Northern Railroad Company	Common	.....	.....
Evansville, Indianapolis & Terre Haute Ry. Co	Common	.....	.....
Leased Railway Properties and Terminal Properties—Mortgage Bonds of:			
Cincinnati Northern Railroad Company	First Mortgage Bonds	7/ 1/1951	.....
Evansville, Mt. Carmel and Northern Ry. Co	First Mortgage Bonds	7/ 1/1960	.....
Peoria and Eastern Railway Company	First Consolidated Mortgage Bonds	4/ 1/1940	$124,000.00
Peoria and Eastern Railway Company O. I. & W.	First Preferred Mortgage Bonds	4/ 1/1938	.....
Peoria and Eastern Railway Company I. B. & W.	First Preferred Mortgage Bonds	4/ 1/1940	.....
Terminal Railroad Ass'n of St. Louis	General Mortgage Bonds	1/ 1/1953	6,410,000.00
Louisville & Jeffersonville Bridge & Railroad Co	First Mortgage Bonds	3/ 1/1945	.....
Indianapolis Union. Ry. Co	General and Refunding Mortgage Bonds	1/ 1/1965	.....

ny under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability in Respect of Securities of the Cleveland, Cincinnati, Chicago lway Company, the Michigan Centrail Railroad Company, and Chicago, Kalamazoo and Saginaw Railway Company, Respectively

Statement of Securities—as of July 23, 1929—Continued

Lines Leased or Proposed to be Leased

	Carrier obligated—or Carriers jointly & severally obligated	Total issued	Date of maturity	Total outstanding	C. C. C. & St. L. Ry. Co.'s proportion outstanding
mber 1, 1922	N. Y. C. R. R. Co., M. C. R. R. Co., C. C. C. & St. L. Ry. Co.	$12,660,000.00	9/ 1/1929–1937	$7,596,000.00	$2,016,000.00
1, 1923	N. Y. C. R. R. Co., M. C. R. R. Co., C. C. C. & St. L. Ry. Co.	17,340,000.00	6/ 1/1930–1938	10,404,000.00	558,000.00
1, 1924	N. Y. C. R. R. Co., M. C. R. R. Co., C. C. C. & St. L. Ry. Co., C. N. R. R. Co.	25,050,000.00	6/ 1/1930–1939	16,700,000.00	14,270,000.00
mber 15, 1924	N. Y. C. R. R. Co., M. C. R. R. Co., C. C. C. & St. L. Ry. Co.	20,955,000.00	9/15/1929–1939	15,367,000.00	4,136,000.00
y 15, 1925	N. Y. C. R. R. Co., M. C. R. R. Co., C. C. C. & St. L. Ry. Co.	21,702,000.00	5/15/1930–1940	16,500,000.00	5,852,000.00

urities of Lines Leased or Proposed to be Leased:

	Date of maturity	Held by or for the company	Outstanding	Owned by C. C. C. & St. L. Ry.	Balance outstanding not owned by C. C. C. & St. L. Ry.
Common	.....	.....	$4,003,000.00	$4,001,750.00	$1,250.00
Preferred	.....	.....	428,997.45	.....	428,997.45
Common	.....	.....	3,000,000.00	2,931,600.00	68,400.00
Common	.....	.....	4,290,000.00	4,290,000.00	.....
First Mortgage Bonds	7/ 1/1951	.....	1,000,000.00	581,000.00	419,000.00
First Mortgage Bonds	7/ 1/1960	.....	2,118,000.00	2,118,000.00	.....
First Consolidated Mortgage Bonds	4/ 1/1940	$124,000.00	8,376,000.00	.....	8,376,000.00
First Preferred Mortgage Bonds	4/ 1/1938	.....	500,000.00	.....	500,000.00
First Preferred Mortgage Bonds	4/ 1/1940	.....	915,000.00	.....	915,000.00
General Mortgage Bonds	1/ 1/1953	6,410,000.00	31,790,000.00	.....	31,590,000.00
First Mortgage Bonds	3/ 1/1945	.....	4,500,000.00	.....	4,500,000.00
General and Refunding Mortgage Bonds	1/ 1/1965	.....	7,921,000.00	.....	7,921,000.00

[fol. 163] Application of the New York Central Railroad Company under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability in ... and St. Louis Railway Company, the Michigan Central Railroad Company, and Chicago, Kalamazoo and Saginaw Railway ...

Statement of Securities as of July 23, 1929—Continued

Lines Leased or Proposed to be Leased

Cleveland, Cincinnati, Chicago and St. Louis Railway Company—Securities of Lines Leased or Proposed to be Leased—Continued

Leased Railway Properties— Cincinnati Northern Railroad Company Equipment obligations of:	Carrier Obligated or Carriers jointly & severally obligated	Total issued	Date of maturity	Total outstandi...
New York Central Lines 5% Equipment Trust Certificates of June 1, 1922.....	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co., C. N. R. R. Co., P. & L. E. R. R. Co., P. McK. & Y. R. R. Co.	$27,645,000.00	6/1/1930–1937	$14,744,00...
New York Central Lines 5% Equipment Trust Certificates of June 1, 1924.....	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co., C. N. R. R. Co.	25,050,000.00	6/1/1930–1939	16,700,00...

ral Railroad Company under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability in Respect of Securities of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Michigan Central Railroad Company, and Chicago, Kalamazoo and Saginaw Railway Company, Respectively

Statement of Securities as of July 23, 1929—Continued

Lines Leased or Proposed to be Leased

Company—Securities of Lines Leased or Proposed to be Leased—Continued

ligations of:	Carrier Obligated or Carriers jointly & severally obligated	Total issued	Date of maturity	Total outstanding	C. N. R. R. Co. proportion outstanding
rtificates of June 1, 1922.....	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co., C. N. R. R. Co., P. & L. E. R. R. Co., P. McK. & Y. R. R. Co.	$27,645,000.00	6/1/1930–1937	$14,744,000.00	$616,000.00
rtificates of June 1, 1924.....	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co., C. N. R. R. Co.	25,050,000.00	6/1/1930–1939	16,700,000.00	270,000.00

[fol. 164] Application of the New York Central Railroad Company, under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liabili
and St. Louis Railway Company, the Michigan Central Railroad Company, and Chicago, Kalamazoo and Saginaw Railway C

Statement of Securities as of July 23, 1929

Lines Leased or Proposed to be Leased

			Date of maturity	Held by or the compa
Michigan Central Railroad Company:				
Capital Stock of—Common			.....	$1,60
Mortgage Bonds of:				
Michigan Central Railroad Company	First Mortgage Bonds		5/ 1/1952	.....
Grand River Valley Railroad	First Mortgage Bonds		9/ 1/1959	.....
Detroit and Bay City Railroad	First Mortgage Bonds		3/ 1/1931	.....
Kalamazoo and South Haven Railroad	First Mortgage Bonds		11/ 1/1939	.....
Jackson, Lansing and Saginaw Railroad	First Mortgage Bonds		9/ 1/1951	.....
Michigan Air Line Railroad	First Mortgage Bonds		1/ 1/1940	.....
Joliet and Northern Indiana Railroad	First Mortgage Bonds		7/10/1957	.....
Bay City and Battle Creek Railway	First Mortgage Bonds		12/ 1/1989	.....
Toledo, Canada Southern and Detroit Railway	First Mortgage Bonds		1/ 1/1956	.....
Michigan Central Railroad Company	Refunding and Improvement Mortgage Bonds, Series "A"		1/ 1/1947	6,171,00
Michigan Central Railroad Company	Refunding and Improvement Mortgage Bonds, Series "B"		7/ 1/1935	507,00
Michigan Central Railroad Company	Refunding and Improvement Mortgage Bonds, Series "C"		1/ 1/1979	.....

	Carrier obligated—or carriers jointly and severally obligated	Total issued	Date of maturity	Total outstandi
Equipment Obligations of:				
Michigan Central Railroad 5% Equipment Trust Certificates of 1915	M. C. R. R. Co	$4,500,000.00	10/ 1/1929–1930	$600,00
Michigan Central Railroad 6% Equipment Trust Certificates of 1917	M. C. R. R. Co	8,802,000.00	3/ 1/1930–1932	1,800,00
New York Central Railroad Co. 7% Equipment Trust Certificates of April 15, 1920	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C. & St. L. Ry. Co., P. & L. E. R. R. Co., T. & O. C. Ry. Co.	36,225,000.00	4/15/1930–1935	14,490,00
New York Central Lines 5% Equipment Trust Certificates of June 1, 1922	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C. & St. L. Ry. Co., C. N. R. R. Co., P. & L. E. R. R. Co., P. McK. & Y. R. R. Co.	27,645,000.00	6/ 1/1930–1937	14,744,00
New York Central Lines 4½% Equipment Trust Certificates of September 1, 1922	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C. & St. L. Ry. Co.	12,660,000.00	9/ 1/1929–1937	7,596,000

mpany, under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability in Respect of Securities of the Cleveland, Cincinnati, Chicago way Company, the Michigan Central Railroad Company, and Chicago, Kalamazoo and Saginaw Railway Company, Respectively

Statement of Securities as of July 23, 1929

Lines Leased or Proposed to be Leased

		Date of maturity	Held by or for the company	Outstanding	Owned by applicant	Balance outstanding not owned by applicant
.....	.....	.....	$1,600.00	$18,736,400.00	$18,603,800.00	$132,600.00
.....	First Mortgage Bonds.....	5/ 1/1952	.....	18,000,000.00	.....	18,000,000.00
.....	First Mortgage Bonds.....	9/ 1/1959	.....	1,500,000.00	.....	1,500,000.00
.....	First Mortgage Bonds.....	3/ 1/1931	.....	4,000,000.00	.....	4,000,000.00
.....	First Mortgage Bonds.....	11/ 1/1939	.....	700,000.00	.....	700,000.00
.....	First Mortgage Bonds.....	9/ 1/1951	.....	1,695,000.00	.....	1,695,000.00
.....	First Mortgage Bonds.....	1/ 1/1940	.....	2,600,000.00	.....	2,600,000.00
.....	First Mortgage Bonds.....	7/10/1957	.....	1,500,000.00	.....	1,500,000.00
.....	First Mortgage Bonds.....	12/ 1/1989	.....	49,000.00	.....	49,000.00
.....	First Mortgage Bonds.....	1/ 1/1956	.....	3,100,000.00	.....	3,100,000.00
funding and Improvement Mortgage Bonds, Series "A".....		1/ 1/1947	6,171,000.00	.....	.....	.....
funding and Improvement Mortgage Bonds, Series "B".....		7/ 1/1935	507,000.00	.....	.....	.....
funding and Improvement Mortgage Bonds, Series "C".....		1/ 1/1979	.....	7,634,000.00	.....	7,634,000.00

	Carrier obligated—or carriers jointly and severally obligated	Total issued	Date of maturity	Total outstanding	M. C. R. R. Co. proportion outstanding
.....	M. C. R. R. Co.....	$4,500,000.00	10/ 1/1929–1930	$600,000.00	$600,000.00
.....	M. C. R. R. Co.....	8,802,000.00	3/ 1/1930–1932	1,800,000.00	1,800,000.00
115, 1920....	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C. & St. L. Ry. Co., P. & L. E. R. R. Co., T. & O. C. Ry. Co.	36,225,000.00	4/15/1930–1935	14,490,000.00	2,805,998.50
922.....	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C. & St. L. Ry. Co., C. N. R. R. Co., P. & L. E. R. R. Co., P. McK. & Y. R. R. Co.	27,645,000.00	6/ 1/1930–1937	14,744,000.00	2,984,000.00
ber 1, 1922...	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C. & St. L. Ry. Co.	12,660,000.00	9/ 1/1929–1937	7,596,000.00	459,000.00

[fol. 165] Application of the New York Central Railroad Company, under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability
and St. Louis Railway Company, The Michigan Central Railroad Company, and Chicago, Kalamazoo and Saginaw Railway C

Statement of Securities as of July 23, 1929—Continued

Lines Leased or Proposed to be Leased

Michigan Central Railroad Company:	Carrier obligated- or carriers jointly and severally obligated	Total issued	Date of maturity	Total outstandin
Equipment Obligations of—Continued:				
New York Central Lines 5% Equipment Trust Certificates of June 1, 1923	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co.	$17,340,000.00	6/ 1/1930–1938	$10,404,000
New York Central Lines 5% Equipment Trust Certificates of June 1, 1924	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co., C. N. R. R. Co.	25,050,000.00	6/ 1/1930–1939	16,700,000
New York Central Lines 4½% Equipment Trust Certificates of September 15, 1924	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co.	20,955,000.00	9/15/1929–1939	15,367,000
New York Central Lines 4½% Equipment Trust Certificates of May 15, 1925	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co.	21,702,000.00	5/15/1930–1940	16,500,000

Michigan Central Railroad Company— Securities of Lines Leased—		Date of maturity	Outstandin
Stock of:			
Canada Southern Railway Company		.....	$15,000,000
Detroit River Tunnel Company		.....	3,000,000
Mortgage Bonds of:			
Battle Creek and Sturgis Railway Company	First Mortgage Bonds	12/ 1/1989	500,000
Canada Southern Railway Company	First and Refunding Mortgage Bonds	10/ 1/1962	22,500,000
Detroit River Tunnel Company	First Mortgage Bonds	5/ 1/1961	18,000,000
Lansing Manufacturers Railroad	First Mortgage Bonds	7/ 1/1930	19,000
Leamington and St. Clair Railway	First Mortgage Bonds	10/ 1/1945	130,000
Also: Toledo Terminal Railroad Company	First Mortgage Bonds	11/ 1/1957	5,241,000

Chicago, Kalamazoo and Saginaw Railway Company:		Date of maturity	Outstandin
Securities of:			
Capital Stock		.....	$450,000
Mortgage Bonds	First Mortgage Bonds	6/30/1959	468,000

al Railroad Company, under Section 20a of the Interstate Commerce Act, for Authority to Assume Obligation and Liability in Respect of Securities of The Cleveland, Cincinnati, Chicago St. Louis Railway Company, The Michigan Central Railroad Company, and Chicago, Kalamazoo and Saginaw Railway Company, Respectively

Statement of Securities as of July 23, 1929—Continued

Lines Leased or Proposed to be Leased

	Carrier obligated– or carriers jointly and severally obligated	Total issued	Date of maturity	Total outstanding	M. C. R. R. Co. proportion outstanding
ates of June 1, 1923	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co.	$17,340,000.00	6/ 1/1930–1938	$10,404,000.00	$5,688,000.00
ates of June 1, 1924	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co., C. N. R. R. Co.	25,050,000.00	6/ 1/1930–1939	16,700,000.00	2,330,000.00
ficates of September 15, 1924	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co.	20,955,000.00	9/15/1929–1939	15,367,000.00	1,903,000.00
ficates of May 15, 1925	N. Y. C. R. R. Co., M. C. R. R. Co., C., C., C., & St. L. Ry. Co.	21,702,000.00	5/15/1930–1940	16,500,000.00	2,574,000.00

		Date of maturity	Outstanding	Owned by M. C. R. R. Co.	Balance not owned outstanding
		.....	$15,000,000.00	$8,324,900.00	$6,675,100.00
		.....	3,000,000.00	3,000,000.00	.....
	First Mortgage Bonds	12/ 1/1989	500,000.00	24,000.00	476,000.00
	First and Refunding Mortgage Bonds	10/ 1/1962	22,500,000.00	.....	22,500,000.00
	First Mortgage Bonds	5/ 1/1961	18,000,000.00	.....	18,000,000.00
	First Mortgage Bonds	7/ 1/1930	19,000.00	.....	19,000.00
	First Mortgage Bonds	10/ 1/1945	130,000.00	.....	130,000.00
	First Mortgage Bonds	11/ 1/1957	5,241,000.00	.....	5,241,000.00

		Date of maturity	Outstanding	Owned by applicant	Owned by M. C. R. R.
		.....	$450,000.00	$180,000.00	$270,000.00
	First Mortgage Bonds	6/30/1959	468,000.00	187,000.00	281,000.00

[fol. 166] In United States District Court

[Title omitted]

Due and timely service of a copy of the within Order with Notice of Entry is hereby admitted, this 2nd day of January, 1930.

Elmer B. Collins, Special Assistant to the Attorney General, Solicitor for the United States of America, Washington, D. C. Daniel W. Knowlton, Solicitor for the Interstate Commerce Commission, Washington, D. C. Jacob Aronson, Solicitor for Deft. Railroad Companies, No. 466 Lexington Avenue, New York City. 12/31/29.

[fol. 167] In United States District Court

[Title omitted]

Notice of Entry of Order

Sirs: Please take notice that the annexed is a true copy of an order duly made and entered in the above entitled action, and filed in the office of the Clerk of the said Court, at his office in the Old Post Office Building, in the Borough of Manhattan, City of New York, the 28th day of December, 1929.

Dated New York, December 31st, 1929.

Yours &c., House, Grossman & Vorhaus, Attorneys for Petitioner. Office & P. O. address: 521 Fifth Avenue, Borough of Manhattan, City of New York.

To Elmer B. Collins, Esq., Special Assistant to the Attorney general, Solicitor for the United States of America, Washington, D. C. Daniel W. Knowlton, Esq., Solicitor for the Interstate Commerce Commission, Washington, D. C. Jacob Aronson, Esq., Solicitor for defendant Railroad Companies, No. 466 Lexington Avenue, New York City.

[fol. 168] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO INTERPOSE SUPPLEMENTAL PETITION—Filed Dec. 28, 1929

A motion having been made herein by the above named Petitioner for leave to interpose herein a supplemental petition, and said motion having duly come on to be heard;

Now, upon reading and filing the notice of motion herein, dated December 19th, 1929, the affidavit of Clarence H. Venner, Jr., sworn to the 19th day of December, 1929, and the proposed supplemental petition, duly verified the 19th day of December, 1929, with proof of due service thereof; and upon reading the petition herein, filed the 21st day of August, 1929, and the answers of the several defendants [fol. 169] herein; and after hearing Joseph Fischer, of counsel for the petitioner, in support of said motion, and Jacob Aronson, Esq., of counsel for the defendant Railroad Companies, appearing, but not opposing the same; and no one appearing in opposition thereto; and due deliberation having been had thereon; it is

Ordered, that said motion be, and hereby is, in all respects granted; and it is further

Ordered, that the above named petitioner be, and hereby is, granted leave to interpose herein the said supplemental petition, verified the 19th day of December, 1929; and it is further

Ordered, that service of the said supplemental petition, be made on the solicitors for the respective defendants within ten (10) days after entry of this order; and that within thirty (30) days after such service thereof, the said defendants file their respective answers thereto.

Alfred C. Coxe, U. S. D. J.

A. G., Jr.

[File endorsement omitted.]

[fol. 170] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO SUPPLEMENTAL PETITION—Filed Jan. 6, 1930

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled

suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the supplemental petition filed by petitioner, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

Answering paragraphs I to VI, inclusive, of the supplemental petition, the Commission admits and alleges that, as heretofore shown in its answer to the original petition filed herein, it made and entered its order of July 2, 1929, in Finance Docket No. 5690, New York Central Unification, referred to in paragraph numbered 26 of said original petition, by which said order it authorized acquisition of control by the Cleveland, Cincinnati, Chicago & St. Louis Railway [fol. 171] Company, hereinafter called the Big Four, of the railroad properties of the Cincinnati Northern Railroad Company and of the Evansville, Indianapolis & Terré Haute Railway Company, hereinafter called the Cincinnati Northern and the Terre Haute, respectively, and acquisition of control by the New York Central Railroad Company, hereinafter called the New York Central, of the railroad system (a) of the Big Four, including the interest of the latter in the properties of the Cincinnati Northern, the Terre Haute, the Peoria & Eastern Railway Company and the Kankakee & Seneca Railroad Company, (b) of the railroad system of the Michigan Central Railroad Company, and (c) of the railroad properties of the Chicago, Kalamazoo & Saginaw Railway Company, all in accordance with the terms of certain proposed leases set forth in the applications for such authority filed with it by the Big Four and by the New York Central; that said authority was granted upon conditions prescribed in the Commission's report of January 14, 1929, and its supplemental report of July 2, 1929, issued in said proceeding, copies of which said reports were attached to and made parts of the Commission's said answer heretofore filed herein; that one of said conditions provided that nothing therein should be "construed to relieve the Big Four or the New York Central from compliance with provisions of law applicable to any assumption of obligations and liabilities, etc., by virtue of execution of the proposed leases"; that after the making and entry of said order of July 2, 1929, the Big Four duly applied for authority under

Section 20a of the Interstate Commerce Act to assume obligation and liability pursuant to the terms of said leases in respect of securities of the Cincinnati Northern and Terre Haute, and the New York Central duly applied for authority under said section 20a of said Act to assume obligation and [fol. 172] liability pursuant to the terms of said leases in respect of securities of the Big Four, of the Michigan Central Railroad Company, of the Chicago, Kalamazoo & Saginaw Railway Company, and in respect of securities of certain other companies, the properties of which are either leased, proposed to be leased, or used, by either the Big Four or the Michigan Central Railroad Company; that the proceeding so instituted by said applications of the Big Four and of the New York Central were respectively entitled Finance Docket No. 7745, Assumption of Obligation and Liability by Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and Finance Docket No. 7744, Assumption of Obligation and Liability by New York Central Railroad Company; that interventions in opposition to said application of the New York Central were filed by petitioner and by the protective committee of the common stockholders of the Big Four; and that counsel for said protective committee of the common stockholders of the Big Four appeared at the oral argument and withdrew that committee's objections, the stockholders represented by it having arranged to sell their holdings to the New York Central.

The Commission further admits and alleges that it duly made, entered and served upon the parties to said proceedings, its report and order dated December 2, 1929, copy whereof is hereto attached and made a part hereof, marked Exhibit A, which said report and order embraced and included its reports, findings, conclusions and orders in both Finance Docket No. 7744, Assumption of Obligation and Liability by New York Central Railroad Company, and in Finance Docket No. 7745, Assumption of Obligation and Liability by Cleveland, Cincinnati, Chicago & St. Louis Railway Company; that prior to the making, entering and serving of said report and order, as aforesaid, it accorded to [fol. 173] the parties to said proceedings, including petitioner herein, the full hearings provided for in the Interstate Commerce Act; that at said hearing a large volume of testimony and other evidence bearing upon the matters covered by said report and order was submitted to the Com-

mission for consideration, on behalf of said parties, including the petitioner herein, by their respective counsel; that at said hearings questions relating to said matters were fully argued and submitted to the Commission for determination, on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and made and entered said report and order, which include the Commission's decisions, findings, conclusions, orders and authorizations in the premises; that upon the evidence before it, and as shown in and by said report and order, the Commission made the findings and stated the conclusions upon which said order is based.

The Commission further alleges that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the issues raised, and the evidence before the Commission in said proceedings; that, in making said report and order, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including all material matters covered by the allegations of the supplemental petition herein, that said order was not made or entered by it either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the Commission denies each of and all the allegations to the contrary contained in [fol. 174] said supplemental petition.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in said petition, in so far as they conflict either with the allegations herein or with the statements or conclusions of fact included in said report and order of the Commission, which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove, as this honorable court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, by Daniel W. Knowlton, Chief Counsel.

Duly sworn to by Balthasar M. Meyer. Jurat omitted in printing.

[fol. 175] EXHIBIT "A" TO ANSWER OF I. C. C.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 7744[1]

Assumption of Obligation and Liability by NEW YORK CENTRAL RAILROAD COMPANY

Submitted November 18, 1929. Decided December 2, 1929

1. Authority granted the New York Central Railroad Company to assume obligation and liability, as lessee, in respect of the securities shown in appendix A to this report, and in respect of certain other securities which may be issued on or before the effective date of leases it proposes to execute.

2. Authority granted the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to assume obligation and liability, as lessee, in respect of the securities shown in appendix B to this report, and in respect of certain other securities which may be issued on or before the effective date of leases it proposes to execute.

Robert J. Cary, Jacob Aronson, John K. Graves, and John Puryear for applicants.

Elihu Root, Jr., Grenville Clark, and Henry J. Friendly for Protective Committee, Common Stockholders of Cleveland, Cincinnati, Chicago & St. Louis Railway Company, intervener.

Frederick A. Henry for New York Central Securities Corporation, intervener.

Report of the Commission

Division 4, Commissioners Meyer, Eastman, and Woodlock

By DIVISION 4:

The New York Central Railroad Company, hereinafter called the New York Central, a common carrier by rail-

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[1]This report also embraces Finance Docket No. 7745, Assumption of Obligation and Liability by Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

road engaged in interstate commerce, has duly applied for authority under section 20a of the interstate commerce act to assume obligation and liability, as lessee, in respect of the securities of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Michigan Central Railroad Company, and the Chicago, Kalamazoo & Saginaw Railway Company, hereinafter respectively referred to as the Big Four, the Michigan Central, and the Kalamazoo, and collectively referred to as lessors, and in respect of the securities of certain other companies, the properties of which are either leased, proposed to be leased, or used, by either the Big Four or the Michigan Central. The Big Four, a common carrier by railroad engaged in inter- [fol. 176] state commerce, by its application, Finance Docket No. 7745, has duly applied for authority under section 20a of the act to assume obligation and liability, as lessee, in respect of the securities of the Cincinnati Northern Railroad Company and the Evansville, Indianapolis & Terre Haute Railway Company, hereinafter referred to as the Cincinnati Northern and the Terre Haute, and also collectively referred to as the lessors. The securities in respect of which authority is sought to assume obligation and liability are shown in appendixes A and B to this report. The protective committee of the common stockholders of the Big Four intervened and opposed the granting of the application of the New York Central. A hearing was held on that application on August 26, 1929, at which time the New York Central Securities Corporation also intervened and opposed that application. Briefs have been filed and oral argument had. Counsel for the protective committee of the Big Four's common stockholders appeared at the oral argument and withdrew that committee's objections, the stockholders represented by it having arranged to sell their holdings to the New York Central.

By our order in New York Central Unification, 154 I. C. C. 489, we authorized the Big Four to acquire control of the properties of the Cincinnati Northern and the Terre Haute, and the New York Central to acquire control of the railroad system (a) of the Big Four, including the interest in that company in the properties of the Cincinnati Northern, the Terre Haute, the Peoria & Eastern Railway Company, and the Kankakee & Seneca Railroad

Company, (b) of the railroad system of the Michigan Central, and (c) of the railroad properties of the Kalamazoo, in accordance with the terms of certain proposed leases. The authority was granted upon the conditions stated in the supplemental report filed with and made a part of our order. The second condition provides that nothing therein should be construed to relieve the Big Four or the New York Central from compliance with the provisions of law applicable to any assumption of obligations and liabilities, etc., by virtue of execution of the proposed leases. The applications here under consideration were filed in response to that condition.

The proposed leases between the companies above mentioned are substantially alike as to the terms and conditions whereby the lessee companies propose to assume obligations and liabilities in respect of the securities of others. These leases provide that as part of the rents for the leased properties the lessees will (1) pay to the lessors, or for their account, the interest, including amounts applicable to interest or dividends under equipment trusts, upon all bonds, notes, and other obligations or evdences of indebtedness heretofore issued or assumed by the lessor companies and now outstanding, and any extensions thereof, or upon securities that may hereafter be issued pursuant to the leases, (2) subject to reimbursement by the lessors, pay, redeem, or otherwise acquire or renew, extend, or refund, the securities of the lessors, including installments of equipment-trust obligations, as they become due and payable during the terms of the leases, (3) pay, when due, all taxes, rentals, and other charges for which the lessors are liable under any lease, trackage right, easement, license, grant, contract, leasehold, or ordinance right, or under any mortgages or equipment-trust agreements, or under any other contracts entered into or assumed by the lessors, and (4) also pay, for account of the lessors, to or upon the order of the stockholders, amounts equal to annual dividends on each share of stock, except the capital stock registered in the names of the lessees, as follows: Cincinnati Northern $12, Terre Haute

$4, Big Four common stock $10, Big Four preferred stock [fol. 177] $5, Michigan Central $50,[2] Kalamazoo $6.

In the statements of securities accompanying its application, the New York Central has shown, in addition to the data in appendix A, the amounts of various classes of securities held by or for the issuing company. Under the terms of the proposed leases it would not appear that any obligation or liability will be actually assumed as to securities so held or as to the securities shown in the appendixes as being owned by the New York Central, the Big Four, and the Michigan Central. The applicants apparently require authority only in respect of the securities now outstanding in the hands of the public or which may be issued, pursuant to the authority heretofore granted by us but not yet exercised, and become outstanding prior to or upon the execution of the proposed leases.

The Big Four asks that the authority granted be broad enough to cover the assumption by it under the terms of its proposed leases of the Cincinnati Northern and the Terre Haute of obligation or liability in respect of the securities of others outstanding at the effective date of the leases whether or not they are shown in the list of securities accompanying the application. While like language does not appear in the New York Central application, which apparently intended to request similar authority, as it seeks authority to assume obligation and liability under the proposed leases in respect of securities outstanding at the effective date of the leases. The nature and extent of the obligations and liabilities which by the execution of the proposed leases may be incurred by the applicants in respect of the securities of others are matters within the knowledge of the applicants. We said at page 280 of our report in New York Central Unification,[3] that the "responsibility for obtaining all

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[2]Such dividends on the Michigan Central stock pledged as collateral security under the New York Central & Hudson River Railroad Company collateral trust indenture dated April 13, 1898, to the Guaranty Trust Company of New York, trustee, to secure $21,550,000 of 3½ per cent gold bonds, as will enable the trustee to pay the interest on the bonds.

[3] 150 I. C. C. 278.

authority necessary in the premises must remain with the applicants." We adhere to that conclusion.

The New York Central Securities Corporation's objections are based on sections 8807 to 8809, inclusive, of the General Code of Ohio. Section 8809 provides in part that in case of a lease of a railroad situate in whole or in part within that State, the rental reserved and secured for the leased road shall be equal at least to its net earnings for the fiscal year next preceding the one in which the lease is made. The intervener claims that the rental payable under the proposed leases of the Michigan Central and the Big Four, a portion of the railroad of each company being located in Ohio, do not conform to the requirements mentioned of the Ohio code. The testimony is that the net income for 1928 of the Michigan Central and of the Big Four, after deducting dividends on the latter's preferred stock, amounted to $103.49 and $17.69 per share, respectively. These amounts are greater than the rents above stated that are to be paid by the New York Central as dividends upon the stock of the Michigan Central and the common stock of the Big Four. The intervener contends that as the New York Central, the Michigan Central, and the Big Four derive their corporate powers to enter into the proposed leases of the railroads of the companies situate in Ohio from specific provisions of the Ohio code, the execution of leases providing for rents [fol. 178] less than the minimum prescribed by section 8809 of the code would be beyond the corporate capacity of the parties and therefore leases reserving the rents proposed would be invalid. It is claimed that that being so, we would be unable to make the statutory finding required by section 20a, namely that the proposed assumption of obligations or liabilities in respect of the securities of others is for some lawful object within the corporate purposes of the carrier and compatible with the public interest. The intervener maintains that corporate incapacity of the parties to execute valid leases can not be remedied by any authority that we may grant to the applicant under the jurisdiction conferred upon us by section 20a. It insists that in disposing of the New York Central's application herein we should consider and follow the provisions mentioned of the Ohio code. The intervener asks that if our order in New York Central Unification, 154 I. C. C. 489, stands unreserved, the present application should at least be modified so as to entitle the

stockholders represented by it to such dividends upon their holdings as may properly be due to them.

The New York Central contends that in deciding the New York Central unification proceedings we, of necessity, passed upon all the matters and issues involved in its present application, that acquisitions of control of certain carriers pursuant to the terms of the proposed leases were then approved and authorized, and that the terms and conditions of the leases, including provision for assuming obligations and liabilities in respect of the securities of others, were found to be just and reasonable. Therefore, it claims that the granting under section 20a of the authority herein sought would be the formal expression of a conclusion reached in the unification proceedings.

It is further claimed that it could not have been the intent of the provisions of section 5(2) of the interstate commerce act that we should authorize a lease which would be illegal and void; that the contention of the intervener that the legality of proposed leases is not an issue in a proceeding under that section would lead to the absurdity of our authorizing thereunder the acquisition of control under leases which would be illegal and void, and which, if the lease should be one involving assumption by the lessee of obligation or liability in respect of the securities of the lessor, we would have to condemn in a proceeding under section 20a. The New York Central maintains that Congress could, and by the provisions of the interstate commerce act did, confer upon carriers subject thereto corporate powers necessary to enable them to make leases found by us to be in the public interest and approved and authorized under section 5(2). It asserts, however, that it is unnecessary for it to maintain that position, as the Ohio code expressly confers upon carriers the power to lease their railroads, section 8809 of the code imposing limitations upon the amount of rent to be paid; that the power and restriction are separable; that carriers are relieved of that restriction by section 5(8) of the act; and that Federal legislation having occupied the field in respect of railroads subject to the act, all State laws in that regard are superseded and rendered wholly inapplicable. Therefore, that part of the Ohio code imposing a limitation upon the rents payable has been superseded, leaving in force those sections conferring upon carriers the power to enter into leases of their properties. It argues

that it is unthinkable that Congress could have intended that we would only exercise the jurisdiction conferred upon us by section 20a pursuant to the authority of, and not inconsistent with, the provisions of varying State laws. Cases were cited by the intervener and the New York Central in support of their respective positions.

[fol. 179] The provisions of the Ohio code mentioned above were offered by the intervener in its objections in the New York Central unification proceedings and were considered by us in our report thereon, 150 I. C. C. 313, 314. The applications in those proceedings for authority to acquire control of certain carriers under leases were filed under the provisions of section 5(2) of the act. In our findings therein, 150 I. C. C. 321, we found that the proposed acquisition of control by the New York Central and the Big Four of the railroads therein involved under the proposed leases, and for the considerations and upon the terms and conditions set forth therein, which considerations and terms and conditions were found to be just and reasonable in the premises, would be in the public interest. Among the terms and conditions of the proposed leases as approved and authorized was the assumption by the New York Central of obligations and liabilities in respect of the securities of other companies, the details of which were not given in those applications and for which the applicants did not specifically apply for authority under the appropriate section of the act. As section 20a of the act confers upon us power to grant or deny authority to issue securities or to assume obligation or liability as lessee, etc., in respect of the securities of any other person, natural or artificial, only upon application by the carrier for such authority, we could not and did not by our order of July 2, 1929,[4] grant the applicants authority to assume obligations and liabilities in respect of the securities of others as provided for in the proposed leases. The total amount of securities in respect of which the New York Central seeks authority to assume obligation and liability is $311,561,329, and the annual dividends and interest thereon $14,104,864. The intervener represents 286 shares of the Michigan Central's stock out of 1,326 shares not owned by the New York

[4] 154 I. C. C. 489.

Central and 100 shares of the Big Four's common stock. The proposed assumption is incidental to the New York Central's purpose of unifying under leases the railroad systems of the Michigan Central and the Big Four, and is one of the objects in carrying out that plan in accordance with the terms of the proposed leases. Under section 20a(7) we are given exclusive and plenary jurisdiction over the issue of securities and the assumption of obligations and liabilities by carriers subject to the provisions of that section of the act, and upon receiving our authorization thereunder carriers may exercise the authority granted without securing other approval. Whether or not the New York Central, the Michigan Central, and the Big Four have corporate capacity under the Ohio statutes to execute the proposed leases is dependent upon construction of those statutes. Pending such construction by a court of competent authority, we feel that we may accept the opinion of applicant's counsel. We are of the opinion that under the authority conferred upon us by section 20a of the interstate commerce act we have the power to grant the authority sought.

We find that the proposed assumption of obligations and liabilities, as lessee, (1) by the New York Central in respect of the securities shown in appendix A to this report, (2) by the Big Four in respect of the securities shown in appendix B to this report, and (3) by either or both of those companies, as may be appropriate, in respect of the securities of other companies involved in the leases, which may be issued by those companies, on or before the effective date of the proposed leases, pursuant to authority heretofore granted by us but not yet exercised, as aforesaid (a) is for a lawful object within their respective corporate purposes, and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by them of service to the public as common carriers, and which will not impair their ability to perform that service, and (b) is reasonably necessary and apropriate for such purpose.

An appropriate order will be entered.

(Here follow Appendices A and B, side folios 180, 181, 182, and 183)

[fol. 180]

APPENDIX A

Statement of Securities Outstanding in Respect of which New York Central Railroad Proposes to Assume Obligation and Liability

Section I

Securities Issued or Assumed by Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Michigan Central Railroad Company, and Chicago, Kalamazoo &

Company	Security	Maturity	Total outstandin
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	Common stock		$47,028,8
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	Preferred stock		9,998,5
Cincinnati, Indianapolis, St. Louis & Chicago Ry. Co	General first mortgage bonds	Aug. 1, 1936	5,867,0
Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co	General consolidated mtg. bonds	Jan. 1, 1934	3,205,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	Ref. & impr. mtg. bonds, series C	Jan. 1, 1941	1,052,6
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	Ref. & impr. mtg. bonds, series D	July 1, 1963	20,000,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	Ref. & impr. mtg. bonds, series E	July 1, 1977	15,000,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	20-year European loan bonds	June 1, 1930, francs	50,000,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	20-year gold debentures	Jan. 1, 1931	5,000,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	General mortgage gold bonds, 4%	June 1, 1993	28,579,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	General mortgage gold bonds, 5%	June 1, 1993	4,161,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., C. V. & C. Division	First-mortgage bonds	Jan. 1, 1939	5,000,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., C. & W. M. Division	First-mortgage bonds	July 1, 1991	4,000,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., W. W. Division	First-mortgage bonds	July 1, 1940	650,0
Chicago, Indianapolis & St. Louis Short Line Ry. Co	First-mortgage bonds	April 1, 1953	3,000,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., S. & C. Division	First-mortgage bonds	Sept. 1, 1940	1,103,5
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., St. Louis Division	First collateral trust bonds	Nov. 1, 1990	8,643,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	Rachel G. Holmes note	Apr. 1, 1930	3,4
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	Rachel G. Holmes mtg. bond	June 30, 1930	9,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co	Equipment trust No. 44	Jan. 15, 1930–35	2,080,2
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., proportion of	New York Central R. R. equipment trust certificates 4/15/20	Jan. 15, 1930–35	14,490,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., proportion of	New York Central Lines equipment trust certificates 6/1/22	June 1, 1930–37	14,744,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., proportion of	New York Central Lines equipment trust certificates 9/1/22	Sept. 1, 1929–37	7,596,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., proportion of	New York Central Lines equipment trust certificates 6/1/23	June 1, 1930–38	10,404,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., proportion of	New York Central Lines equipment trust certificates 6/1/24	June 1, 1930–39	16,700,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., proportion of	New York Central Lines equipment trust certificates 9/15/24	Sept. 15, 1929–39	15,367,0
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., proportion of	New York Central Lines equipment trust certificates 5/15/25	May 15, 1930–40	16,500,0
[fol. 181]			
Michigan Central R. R. Co	Common stock		18,736,4
Michigan Central R. R. Co	First-mortgage bonds	May 1, 1952	18,000,0
Grand River Valley R. R.	First-mortgage bonds	Sept. 1, 1959	1,500,0
Detroit & Bay City R. R.	First-mortgage bonds	Mar. 1, 1931	4,000,0
Kalamazoo & South Haven R. R.	First-mortgage bonds	Nov. 1, 1939	700,0
Jackson, Lansing & Saginaw R. R.	First-mortgage bonds	Sept. 1, 1951	1,695,0
Michigan Air Line R. R.	First-mortgage bonds	Jan. 1, 1940	2,600,0
Joliet & Northern Indiana R. R.	First-mortgage bonds	July 10, 1957	1,500,0
Bay City & Battle Creek Ry.	First-mortgage bonds	Dec. 1, 1989	49,0
Toledo, Canada Southern & Detroit Ry.	First-mortgage bonds	Jan. 1, 1956	3,100,0
Michigan Central R. R. Co	Ref. & impr. mtg. bonds, series C	Jan. 1, 1979	7,634,0
Michigan Central R. R. Co	Equip.-trust ctf's of 1915	Oct. 1, 1929–30	600,0
Michigan Central R. R. Co	Equip.-trust ctf's of 1917	Mar. 1, 1930–32	1,800,0
Michigan Central R. R. Co.'s proportion of	New York Central R. R. equipment trust certificates 4/15/20	Apr. 15, 1930–35	14,490,0
Michigan Central R. R. Co.'s proportion of	New York Central Lines equipment trust certificates 6/1/22	June 1, 1930–37	14,744,0
Michigan Central R. R. Co.'s proportion of	New York Central Lines equipment trust certificates 9/1/22	Sept. 1, 1929–37	7,596,0
Michigan Central R. R. Co.'s proportion of	New York Central Lines equipment trust certificates 6/1/23	June 1, 1930–38	10,404,0
Michigan Central R. R. Co.'s proportion of	New York Central Lines equipment trust certificates 6/1 /24	June 1, 1930–39	16,700,0
Michigan Central R. R. Co.'s proportion of	New York Central Lines equipment trust certificates 9/15/24	Sept. 15, 1929–39	15,367,0
Michigan Central R. R. Co.'s proportion of	New York Central Lines equipment trust certificates 5/15/25	May 15, 1930–40	16,500,0
Chicago, Kalamazoo & Saginaw Ry. Co	Capital stock		450,0
Chicago, Kalamazoo & Saginaw Ry. Co	First-mortgage bonds	June 30, 1959	468,0

[1] Owned by Cleveland, Cincinnati, Chicago & St. Louis Railway Company.
[2] Represents Cleveland, Cincinnati, Chicago & St. Louis Railway Company's proportion.
[3] Represents Michigan Central Railroad Company's proportion.
[4] Includes $270,000 owned by Michigan Central Railroad Company.
[5] Includes $281,000 owned by Michigan Central Railroad Company.

APPENDIX A

Statement of Securities Outstanding in Respect of which New York Central Railroad Proposes to Assume Obligation and Liability

Section I

by Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Michigan Central Railroad Company, and Chicago, Kalamazoo & Saginaw Railway Company

	Security	Maturity	Total outstanding	Owned by New York Central	Held by public
	Common stock		$47,028,800	$42,941,100	$4,087,700.00
	Preferred stock		9,998,500	8,468,100	1,530,400.00
	General first mortgage bonds	Aug. 1, 1936	5,867,000	.....	5,867,000.00
Co.	General consolidated mtg. bonds	Jan. 1, 1934	3,205,000	.....	3,205,000.00
	Ref. & impr. mtg. bonds, series C	Jan. 1, 1941	1,052,600	.....	1,052,600.00
	Ref. & impr. mtg. bonds, series D	July 1, 1963	20,000,000	684,000	19,316,000.00
	Ref. & impr. mtg. bonds, series E	July 1, 1977	15,000,000	303,000	14,697,000.00
	20-year European loan bonds	June 1, 1930, francs	50,000,000	43,846,500 [1]	6,153,500.00
	20-year gold debentures	Jan. 1, 1931	5,000,000	466,000	4,534,000.00
	General mortgage gold bonds, 4%	June 1, 1993	28,579,000	1,066,000	27,513,000.00
	General mortgage gold bonds, 5%	June 1, 1993	4,161,000	.....	4,161,000.00
C. V. & C. Division	First-mortgage bonds	Jan. 1, 1939	5,000,000	.....	5,000,000.00
J. & W. M. Division	First-mortgage bonds	July 1, 1991	4,000,000	72,000	3,928,000.00
W. W. Division	First-mortgage bonds	July 1, 1940	650,000	.....	650,000.00
	First-mortgage bonds	April 1, 1953	3,000,000	5,000	2,995,000.00
K. & C. Division	First-mortgage bonds	Sept. 1, 1940	1,103,500	.....	1,103,500.00
St. Louis Division	First collateral trust bonds	Nov. 1, 1990	8,643,000	161,000	8,482,000.00
	Rachel G. Holmes note	Apr. 1, 1930	3,425	.....	3,425.00
	Rachel G. Holmes mtg. bond	June 30, 1930	9,000	.....	9,000.00
	Equipment trust No. 44	Jan. 15, 1930-35	2,080,200	.....	2,080,200.00
proportion of	New York Central R. R. equipment trust certificates 4/15/20	Jan. 15, 1930-35	14,490,000	.....	4,566,668.40 [2]
proportion of	New York Central Lines equipment trust certificates 6/1/22	June 1, 1930-37	14,744,000	.....	3,000,000.00 [2]
proportion of	New York Central Lines equipment trust certificates 9/1/22	Sept. 1, 1929-37	7,596,000	.....	2,016,000.00 [2]
proportion of	New York Central Lines equipment trust certificates 6/1/23	June 1, 1930-38	10,404,000	.....	558,000.00 [2]
proportion of	New York Central Lines equipment trust certificates 6/1/24	June 1, 1930-39	16,700,000	.....	4,270,000.00 [2]
proportion of	New York Central Lines equipment trust certificates 9/15/24	Sept. 15, 1929-39	15,367,000	.....	4,136,000.00 [2]
proportion of	New York Central Lines equipment trust certificates 5/15/25	May 15, 1930-40	16,500,000	.....	5,852,000.00 [2]
	Common stock		18,736,400	18,603,800	132,600.00
	First-mortgage bonds	May 1, 1952	18,000,000	.....	18,000,000.00
	First-mortgage bonds	Sept. 1, 1959	1,500,000	.....	1,500,000.00
	First-mortgage bonds	Mar. 1, 1931	4,000,000	.....	4,000,000.00
	First-mortgage bonds	Nov. 1, 1939	700,000	.....	700,000.00
	First-mortgage bonds	Sept. 1, 1951	1,695,000	.....	1,695,000.00
	First-mortgage bonds	Jan. 1, 1940	2,600,000	.....	2,600,000.00
	First-mortgage bonds	July 10, 1957	1,500,000	.....	1,500,000.00
	First-mortgage bonds	Dec. 1, 1989	49,000	.....	49,000.00
	First-mortgage bonds	Jan. 1, 1956	3,100,000	.....	3,100,000.00
	Ref. & impr. mtg. bonds, series C	Jan. 1, 1979	7,634,000	.....	7,634,000.00
	Equip.-trust ctf's of 1915	Oct. 1, 1929-30	600,000	.....	600,000.00
	Equip.-trust ctf's of 1917	Mar. 1, 1930-32	1,800,000	.....	1,800,000.00
	New York Central R. R. equipment trust certificates 4/15/20	Apr. 15, 1930-35	14,490,000	.....	2,805,988.50 [2]
	New York Central Lines equipment trust certificates 6/1/22	June 1, 1930-37	14,744,000	.....	2,984,000.00 [2]
	New York Central Lines equipment trust certificates 9/1/22	Sept. 1, 1929-37	7,596,000	.....	459,000.00 [2]
	New York Central Lines equipment trust certificates 6/1/23	June 1, 1930-38	10,404,000	.....	5,688,000.00 [2]
	New York Central Lines equipment trust certificates 6/1 /24	June 1, 1930-39	16,700,000	.....	2,330,000.00 [2]
	New York Central Lines equipment trust certificates 9/15/24	Sept. 15, 1929-39	15,367,000	.....	1,903,000.00 [2]
	New York Central Lines equipment trust certificates 5/15/25	May 15, 1930-40	16,500,000	.....	2,574,000.00 [2]
	Capital stock		450,000	450,000 [3]	.....
	First-mortgage bonds	June 30, 1959	468,000	468,000 [3]	.....

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[fol. 182] Statement of Securities Outstanding in Respect of Which New York Central Railroad Proposes to Assume Obligation and Liability

Section II

Securities in Respect of Which Cleveland, Cincinnati, Chicago & St. Louis Railway Company Has Assumed, or Proposes to Assume, Obli and Liability under Leases or Contracts

Company	Security	Maturity	Total outstandi
Cincinnati, Sandusky & Cleveland R. R. Co.	Common stock		$4,003,000
Cincinnati, Sandusky & Cleveland R. R. Co.	Preferred stock		428,997
Cincinnati Northern R. R. Co.	Common stock		3,000,000
Evansville, Indianapolis & Terre Haute Ry. Co.	Common stock		4,290,000
Cincinnati Northern R. R. Co.	First-mortgage bonds	July 1, 1951	1,000,000
Evansville, Mt. Carmel & Northern Ry. Co.	First-mortgage bonds	July 1, 1960	2,118,000
Peoria & Eastern Ry. Co.	First-consol. mtg. bonds	Apr. 1, 1940	8,376,000
Peoria & Eastern Ry. Co., O. I. & W.	First-preferred mtg. bonds	Apr. 1, 1938	500,000
Peoria & Eastern Ry. Co., I. B. & W.	First-preferred mtg. bonds	Apr. 1, 1940	915,000
Terminal Railroad Association of St. Louis	General-mortgage bonds	Jan. 1, 1953	31,790,000
Louisville & Jeffersonville Bridge & R. R. Co.	First-mortgage bonds	Mar. 1, 1945	4,500,000
Indianapolis Union Ry. Co.	General and ref. mtg. bonds	Jan. 1, 1965	7,878,000
Cincinnati Northern R. R. Co.'s proportion of	New York Central Lines equipment trust certificates 6/1/22	June 1, 1930–37	14,744,000
Cincinnati Northern R. R. Co.'s proportion of	New York Central Lines equipment trust certificates 6/1/24	June 1, 1930–39	16,700,000

[1] Represents Cincinnati Northern Railroad Company's proportion.

Section III

Securities in Respect of Which Michigan Central Railroad Company Has Assumed Obligation and Liability under Leases or Contract

Company	Security	Maturity	Total outstandi
Canada Southern Railway Company	Capital stock		$15,000,0
Detroit River Tunnel Co.	Capital stock		3,000,0
Battle Creek & Sturgis Ry. Co.	First-mortgage bonds	Dec. 1, 1989	500,0
Canada Southern Ry. Co.	First and ref. mtg. bonds	Oct. 1, 1962	22,500,0
Detroit River Tunnel Co.	First-mortgage bonds	May 1, 1961	18,000,0
Lansing Manufacturers R. R.	First-mortgage bonds	July 1, 1930	19,0
Leamington & St. Clair Ry.	First-mortgage bonds	Oct. 1, 1945	130,0
Toledo Terminal R. R. Co.	First-mortgage bonds	Nov. 1, 1957	5,500,0

[1] Includes $137,000 owned by New York Central Railroad Company and $49,000 owned by Toledo & Ohio Central Railway Company.

Statement of Securities Outstanding in Respect of Which New York Central Railroad Proposes to Assume Obligation and Liability

Section II

Securities in Respect of Which Cleveland, Cincinnati, Chicago & St. Louis Railway Company Has Assumed, or Proposes to Assume, Obligation and Liability under Leases or Contracts

Security	Maturity	Total outstanding	Owned by Cleveland, Cincinnati, Chicago & St. Louis Railway Company	Held by public
Common stock		$4,003,000.00	$4,001,750	$1,250.00
Preferred stock		428,997.45	.....	428,997.45
Common stock		3,000,000.00	2,931,600	68,400.00
Common stock		4,290,000.00	4,290,000	.....
First-mortgage bonds	July 1, 1951	1,000,000.00	581,000	419,000.00
First-mortgage bonds	July 1, 1960	2,118,000.00	2,118,000	.....
First-consol. mtg. bonds	Apr. 1, 1940	8,376,000.00	.....	8,376,000.00
First-preferred mtg. bonds	Apr. 1, 1938	500,000.00	.....	500,000.00
First-preferred mtg. bonds	Apr. 1, 1940	915,000.00	.....	915,000.00
General-mortgage bonds	Jan. 1, 1953	31,790,000.00	.....	31,790,000.00
First-mortgage bonds	Mar. 1, 1945	4,500,000.00	.....	4,500,000.00
General and ref. mtg. bonds	Jan. 1, 1965	7,878,000.00	.....	7,878,000.00
New York Central Lines equipment trust certificates 6/1/22	June 1, 1930–37	14,744,000.00	.....	616,000.00[1]
New York Central Lines equipment trust certificates 6/1/24	June 1, 1930–39	16,700,000.00	.....	270,000.00[1]

[1] Company's proportion.

Section III

Securities in Respect of Which Michigan Central Railroad Company Has Assumed Obligation and Liability under Leases or Contracts

Security	Maturity	Total outstanding	Owned by Michigan Central Railroad Company	Held by public
Capital stock		$15,000,000	$8,324,900	$6,675,100
Capital stock		3,000,000	3,000,000	.....
First-mortgage bonds	Dec. 1, 1989	500,000	24,000	476,000
First and ref. mtg. bonds	Oct. 1, 1962	22,500,000	.....	22,500,000
First-mortgage bonds	May 1, 1961	18,000,000	.....	18,000,000
First-mortgage bonds	July 1, 1930	19,000	.....	19,000
First-mortgage bonds	Oct. 1, 1945	130,000	.....	130,000
First-mortgage bonds	Nov. 1, 1957	5,500,000	323,000[2]	5,177,000

[2] Central Railroad Company and $49,000 owned by Toledo & Ohio Central Railway Company.

[fol. 183]

Appendix B

Statement of Securities Outstanding in Respect of Which Cleveland, Cincinnati, Chicago & St. Louis Railway Company Proposes to As
Obligation and Liability

Company	Security	Maturity	Total outstandin
Cincinnati Northern R. R. Co	Capital stock		$3,000,00
Evansville, Indianapolis & Terre Haute Ry. Co	Capital stock		4,290,00
Cincinnati Northern R. R. Co	First-mortgage bonds	July 1, 1951	1,000,00
Cincinnati Northern R. R. Co.'s proportion of	New York Central Lines equipment trust certificates 6/1/22	June 1, 1930–37	14,744,00
Cincinnati Northern R. R. Co.'s proportion of	New York Central Lines equipment trust certificates 6/1/24	June 1, 1930–39	16,700,00

[1] Represents Cincinnati Northern Railroad Company's proportion.

APPENDIX B

Statement of Securities Outstanding in Respect of Which Cleveland, Cincinnati, Chicago & St. Louis Railway Company Proposes to Assume Obligation and Liability

Security	Maturity	Total outstanding	Owned by Cleveland, Cincinnati, Chicago & St. Louis Railway Company	Held by public
.....Capital stock.....		$3,000,000	$2,931,600	$68,400
Co.....Capital stock.....		4,290,000	4,290,000	.....
.....First-mortgage bonds.....	July 1, 1951.....	1,000,000	581,000	419,000
of.....New York Central Lines equipment trust certificates 6/1/22.....	June 1, 1930–37.....	14,744,000	.....	616,000[1]
of.....New York Central Lines equipment trust certificates 6/1/24.....	June 1, 1930–39.....	16,700,000	.....	270,000[1]

[1] Company's proportion.

[fol. 184] Order

At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office, in Washington, D. C., on the 2d Day of December, A. D. 1929

Finance Docket No. 7744

Assumption of Obligation and Liability by New York Central Railroad Company

Finance Docket No. 7745

Assumption of Obligation and Liability by Cleveland, Cincinnati, Chicago & St. Louis Railway Company

A hearing upon the application in Finance Docket No. 7744, and investigation of the matters and things involved in these proceedings having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, pursuant to the terms of proposed leases set forth in its application and the report aforesaid, the New York Central Railroad Company be, and it is hereby, authorized to assume obligation and liability, as lessee, in respect of the securities shown in appendix A to the report herein, and in respect of the securities of other companies involved in said leases which may be issued by said companies, on or before the effective date of the proposed leases, pursuant to authority heretofore granted by this commission but not yet exercised.

It is further ordered, That, pursuant to the terms of the proposed leases set forth in its application and the report aforesaid, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company be, and it is hereby, authorized to assume obligation and liability, as lessee, in respect of the securities shown in appendix B to the report herein, and in respect of the securities of other companies involved in said leases which may be issued by said companies, on or before the effective date of the proposed leases, pursuant to authority heretofore granted by this commission, but not yet exercised.

It is further ordered, That, except as herein authorized, obligation and liability in respect of said securities shall not be assumed by the applicants, or either of them, unless and until so ordered by this commission.

It is further ordered, That the applicants, or either one of them acting for both, shall report concerning the matters herein involved in conformity with the commission's order dated February 19, 1927, respecting applications filed under section 20a of the interstate commerce act; said report or reports to include any securities, in respect of which the applicants assume obligation and liability, that may be issued between the date of this order and the effective date of the proposed leases.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said securitites, or dividends or interest thereon, on the part of the United States.

[fol. 185] And it is further ordered, That this order shall become effective 30 days from its date.

By the Commission, Division 4.

George B. McGinty, Secretary. (Seal.)

[File endorsement omitted.]

[fol. 186] In United States District Court

[Title omitted]

Answer of United States of America to Supplemental Petition

United States, one of the defendants in the above-entitled suit, for answer to the supplemental petition filed therein, answers and says:

I

United States admits the allegations of paragraphs numbered 1, 2, and 3 of the supplemental petition, with this exception: Inasmuch as no copy of the application referred to in the last two sentences of paragraph numbered 1 was attached to the copy of the supplemental petition which was

served upon it, United States is without knowledge whether the copy of that application so referred to is correct, and, therefore, neither admits nor denies said allegation.

II

Answering paragraph numbered 4 of the supplemental petition, United States

(1) admits that Section 8809 of the General Code of [fol. 187] Ohio, in which State, among others, the New York Central and the Big Four are incorporated, and in which those railroads own and operate railroad property, requires that in case of a lease of a railroad situated wholly or in part in that State the rental therefor shall be equal at least to the leased railroad's net earnings for the fiscal year next preceding the year in which the lease is made;

(2) admits that the rental payable by the New York Central under the proposed leases is less than the amount which petitioner alleges to be the net earnings of said Big Four and Michigan companies for the year 1928, being the last fiscal year; and

(3) denies all the remaining allegations of said paragraph numbered 4.

III

United States admits the allegations of paragraph numbered 5.

IV

United States denies the allegations of paragraph numbered 6 of the supplemental petition.

Wherefore, having fully answered, United States prays that the relief sought be denied and the supplemental petition dismissed with costs to petitioner, and that it have the benefit of such other and further orders and decrees as may be appropriate.

Elmer B. Collins, Special Assistant to the Attorney General. John Lord O'Brian, Assistant to the Attorney General. Charles H. Tuttle, United States Attorney.

[fol. 188] IN UNITED STATES DISTRICT COURT

[Title omitted]

JOINT AND SEVERAL ANSWER OF THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, AND THE MICHIGAN CENTRAL RAILROAD COMPANY TO THE SUPPLEMENTAL PETITION—Filed Jan. 22, 1930

The New York Central Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company and The Michigan Central Railroad Company, hereinafter respectively called the New York Central, the Big Four and the Michigan Central, defendants in the above-entitled cause, for answer to the supplemental petition herein, answer and say:

I

Answering paragraph 1 of said supplemental petition, these defendants admit that on or about July 24, 1929, the defendant, The New York Central Railroad Company, filed [fol. 189] with the Interstate Commerce Commission an application which was recorded in Finance Docket of said Commission No. 7744 and a copy of which is stated in said paragraph 1 of the supplemental petition to have been filed therewith.

II

Answering paragraph 2 of said supplemental petition, these defendants admit that the application in said Finance Docket No. 7744 contained among other things the allegations recited in said paragraph, but reference is hereby made to the said application itself for the full text thereof.

III

Answering paragraph 3 of said supplemental petition, these defendants admit that the petitioner filed with the Interstate Commerce Commission its petition for leave to intervene in said Finance Docket No. 7744, but deny that therein the petitioner prayed that the said application of the New York Central be denied.

IV

Answering paragraph 4 of said supplemental petition, these defendants admit that the petitioner alleged before the Commission the matters and things therein set forth; these defendants admit that Section 8809 of the General Code of Ohio reads as follows:

"§ 8809. Vote of Stockholders of Each Company Requisite—No such aid shall be furnished, nor any purchase or [fol. 190] lease perfected, until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such place and in such manner as is provided for the annual meetings of the companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting, assent thereto. In case of the lease of a railroad situate in whole or part within this state, the rental reserved and secured for the leased road shall be equal, at least to its net earnings for the fiscal year next preceding the one in which the lease is made."

These defendants deny that there is any item or entry of "net earnings" in the income or other accounts of either lessor company, which accounts are kept and computed in accordance with the classifications prescribed by the Interstate Commerce Commission, and, except as specifically admitted in their joint and several answer to the original petition herein, these defendants deny all other allegations in said paragraph 4 of the supplemental petition contained.

Further answering said paragraph 4, these defendants allege that said Section 8809 of the General Code of Ohio is neither controlling nor applicable in the premises, and further allege that the calendar year 1928 is not the fiscal year next preceding the one in which the said leases are made.

V

Answering paragraph 5 of said supplemental petition, these defendants admit that on the 2nd day of December, 1929, the Interstate Commerce Commission, after hearing and argument in said Finance Docket No. 7744, made and [fol. 191] entered its order bearing that date authorizing the New York Central to assume obligation and liability

as lessee in respect of securities of the Michigan Central, Big Four, Chicago, Kalamazoo & Saginaw, and of their leased lines.

VI

Answering paragraph 6 of said supplemental petition, these defendants deny the allegations therein contained.

VII

These defendants deny the allegations of said supplemental petition not hereinbefore specifically controverted or admitted.

All of which matters and things these defendants are ready to aver, maintain and prove as this honorable Court may direct, and pray that said supplemental petition be dismissed at the cost of the petitioner and for such other and further relief and order as may be appropriate.

The New York Central Railroad Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Michigan Central Railroad Company, by Jacob Aronson, Solicitor. Office and Post Office address: 466 Lexington Avenue, New York, N. Y. Jacob Aronson, Frank E. Robson, Harry N. Quigley, Crosby J. Beakes, of Counsel.

[fol. 192] *Duly sworn to by Albert H. Harris. Jurat omitted in printing.*

Service admitted.

[File endorsement omitted.]

[fol. 193] In United States District Court

[Title omitted]

Motion to Dismiss—Filed Feb. 27, 1931

United States of America, one of the defendants in the above-entitled cause, having heretofore filed its answers to the petition and to the supplemental petition, setting forth its admissions, denials, and defenses to the matters and

things alleged in said petitions, now comes and, as an additional defense to the petitions, moves the Court to dismiss the petitions on the following grounds:

1. The petitioner is without legal or other valid right under the Act invoked by the petitions, or under any other law, to maintain this suit against the United States.

2. The statements and allegations contained in the petitions are insufficient to show that the order of the Interstate Commerce Commission causes or will cause petitioner to suffer such legal damage as would entitle it to the injunctive relief prayed in the petitions; and are further insufficient to show that the petitioner has the legal right necessary to enable it to maintain this suit independently and in its own behalf against the United States.

Wherefore United States prays that an order be entered [fol. 194] dismissing the petition and supplemental petition, at the cost of the petitioner.

Elmer B. Collins, Special Assistant to the Attorney General. John Lord O'Brian, Assistant to the Attorney General. George Z. Medalie, United States Attorney.

[File endorsement omitted.]

[fol. 195] In United States District Court

[Title omitted]

Motion to Dismiss—Filed March 2, 1931

The Interstate Commerce Commission, one of the defendants in the above-entitled cause, having heretofore filed its answers to the original petition and to the supplemental petition, now comes and, as an additional defense to the petitions, moves the court to dismiss the petitions on the following grounds:

1. The petitioner is without legal or other valid right under the Act invoked by it, or under any other law, to maintain its suit to set aside the order of the Interstate Commerce Commission, referred to in said original petition,

either as to the authorization thereby granted the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and the New York Central Railroad Company to acquire control by lease of certain other carriers by railroad, or as to such part of said order as imposes the condition that the New York Central Railroad Company acquire certain connecting short-line railroads therein described.

2. The petitioner is without legal or other valid right under the Act invoked by it, or under any other law, to main-
[fol. 196] tain its suit to set aside the order of the Commission, referred to in its said supplemental petition.

Wherefore the Interstate Commerce Commission prays that an order be entered dismissing said original and supplemental petitions, at the cost of the petitioner.

Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission.

[File endorsement omitted.]

[fol. 197] In United States District Court

[Title omitted]

Consent to Use of Original Exhibits—Filed Feb. 9, 1932

The undersigned, parties hereto, hereby consent, with the approval of the United States District Court, to the filing in the Supreme Court of the United States of original exhibits 1 and 2 in the above named case, being the record in Finance Docket 5690 and the record in Finance Docket 7744, respectively.

House, Grossman & Vorhaus, by Joseph Fischer, Joseph Fischer, Attorney for Plaintiff.

Consented to.

Daniel W. Knowlton, Attorney for Interstate Commerce Commission. Elmer B. Collins, Attorney for United States of America. Jacob Aronson, Attorney for New York Central R. Co., C., C., C. & St. Louis Rwy. Co., & Michigan Central R. Co.

Approved 2/8/32.

Alfred C. Coxe, Judge United States District Court.

[File endorsement omitted.]

[fols. 198-200]

PLAINTIFF'S EXHIBIT 3

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company

Report of the Board of Directors to the Stockholders for the Year Ended December 31, 1929

Cincinnati, Ohio

* * * * * * *

[fol. 201]

Income Account for the Year

	Year ended Dec. 31, 1929	Year ended Dec. 31, 1928	Increase	Decrease
Operating income:	2,398.96 miles operated	2,397.25 miles operated	1.71 miles	
Railway operations:				
Railway operating revenues	$91,981,899.69	$88,830,152.40	$3,151,747.29	.....
Railway operating expenses	69,624,282.57	66,989,154.90	2,635,127.67	.....
Net revenue from railway operations	$22,357,617.12	$21,840,997.50	$516,619.62	.....
Percentage of expenses to revenues	(75.69)	(75.41)	(.28)	
Railway tax accruals	$5,339,342.21	$4,928,865.04	$410,477.17	.....
Uncollectible railway revenues	19,866.58	16,208.37	3,658.21	.....
Railway operating income	$16,998,408.33	$16,895,924.09	$102,484.24	.....
Equipment rents, net debit	$450,465.27	$847,294.35	.....	$396,829.08
Joint facility rents, net debit	627,148.64	426,092.15	$201,056.49	.....
Net railway operating income	$15,920,794.42	$15,622,537.59	$298,256.83	.....

PLAINTIFF'S EXHIBIT 3—Continued

	Year ended Dec. 31, 1929 2,398.96 miles operated	Year ended Dec. 31, 1928 2,397.25 miles operated	Increase 1.71 miles	Decrease
Miscellaneous operations:				
Revenues	$14,498.08	$12,509.03	$1,989.05	.....
Expenses and taxes	19,078.49	17,254.63	1,823.86	.....
Miscellaneous operating deficit	$4,580.41	$4,745.60	.....	$165.19
Total operating income	$15,916,214.01	$15,617,791.99	$298,422.02	.....
Non-operating income:				
Miscellaneous rent income	$278,261.02	$289,191.29	.....	$10,930.27
Miscellaneous non-operating physical property	166,846.35	163,000.90	$3,845.45	.....
Separately operated properties—profit	7,326.42	1,986.48‡*	9,312.90	.....
Dividend income	665,953.90	387,656.40	278,297.50	.....
Income from funded securities	849,861.30	551,579.19	298,282.11	.....
Income from unfunded securities and accounts	354,847.81	556,338.59	.....	201,490.78
Release of premiums on funded debt	65.00	223.15	.....	158.15
Miscellaneous income	14,059.21	23,942.88	.....	9,883.67
Total non-operating income	$2,337,221.01	$1,969,945.92*	$367,275.09	.....
Gross income	$18,253,435.02	$17,587,737.91*	$665,697.11	.....
Deductions from gross income:				
Rent for leased roads	$472,152.62	$417,510.71	$54,641.91	.....
Miscellaneous rents	202,824.44	198,272.67	4,551.77	.....
Miscellaneous tax accruals	46,074.04	75,050.00	.....	$28,975.96
Separately operated properties—loss	73,027.38	90,237.79*	.....	17,210.41
Interest on funded debt	8,002,910.59	7,697,785.93	305,124.66	.....
Interest on unfunded debt	20,996.18	18,343.31	2,652.87	.....
Amortization of discount on funded debt	202,011.95	252,400.18	.....	50,388.23

Maintenance of investment organization	735.97	527.57	208.40	.....
Miscellaneous income charges	16,713.98	17,786.58	.....	1,072.60
Total deductions from gross income	$9,037,447.15	$8,767,914.74*	$269,532.41	.....
Net income	$9,215,987.87	$8,819,823.17	$396,164.70	.....
Per cent on the common stock outstanding after preferred dividends	(18.53)	(17.69)	(.84)	
Disposition of net income:				
Dividends declared:				
On preferred stock, 5 per cent each year	$499,925.00	$499,925.00	.....	.....
On common stock, 8 per cent each year	3,762,304.00	3,762,304.00	.....	.....
Sinking funds	53,991.78	51,700.44	$2,291.34	.....
Total appropriations of income	$4,316,220.78	$4,313,929.44	$2,291.34	.....
Surplus for the year carried to profit and loss	$4,899,767.09	$4,505,893.73	$393,873.36	.....

‡ Deficit.
* Restated for comparative purposes.

[fols. 202 & 203] Profit and Loss Account

Balance to credit of profit and loss, December 31, 1928.....		$59,685,866.84
Additions:		
Surplus for the year 1929.....	$4,899,767.09	
Profit on sale of land.....	121,774.19	
Unrefundable overcharges.....	14,609.05	
Donations.....	13,879.11	
Reacquirement of securities below par..	12,866.50	
		5,062,895.94
		$64,748,762.78
Deductions:		
Surplus appropriated for investment in physical property.....	$106,974.20	
Loss on property retired.....	258,682.49	
Amount previously carried as advances to Cincinnati Lafayette and Chicago Railroad Company.....	242,472.05	
Uncollectible accounts and miscellaneous items (net).....	13,316.80	
		621,445.54
Balance to credit of profit and loss, December 31, 1929.....		$64,127,317.24

Road Operated

	1929 Miles	1928 Miles	Increase Miles	Decrease Miles
Main line and branches owned.....	1,698.17	1,694.82	3.35	....
Leased lines.....	202.83	202.83	....	....
Lines operated under contract.....	326.98	328.99	....	2.01
Lines operated under trackage rights.	170.98	170.61	.37	....
Totals.....	2,398.96	2,397.25	1.71	....

An increase of 3.35 miles of main line and branches results from reclassification of yard tracks due to inauguration of passenger service to Kilmer mine on the Saline Valley Branch, 3.64 miles, less a reduction of 29/100ths of a mile, due to remeasurement of main tracks. A decrease of 2.01 miles in lines operated under contract results from transferring the operation of the Mount Gilead Short Line Railroad to The New York Central Railroad Company. An increase of 37/100ths of a mile operated under trackage rights is due to rearrangement of tracks in the Louisville and Cleveland territories.

Operating Expenses

Operating expenses, by groups, were as follows:

Group	Amount	Comparison	
Maintenance of way and structures.	$10,283,850.39	$392,658.25	Increase
Maintenance of equipment.....	20,093,486.16	1,039,948.81	Increase
Traffic.....	1,909,127.54	75,931.80	Increase
Transportation.....	33,466,816.90	998,383.57	Increase
Miscellaneous operations.....	1,112,655.29	92,273.85	Increase
General.....	2,872,359.63	79,544.09	Increase
Transportation for investment—credit.....	114,013.34	43,612.70	Decrease
	$69,624,282.57	$2,635,127.67	Increase

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[fols. 204-206] PLAINTIFF'S EXHIBIT 4

The Michigan Central Railroad Company

Report of the Board of Directors to the Stockholders for the Year Ended December 31, 1929

Detroit, Michigan

* * * * * * *

[fol. 207] Income Account for the Year

	Year ended Dec. 31, 1929	Year ended Dec. 31, 1928	Increase	Decrease
	1,858.34 miles operated	1,858.42 miles operated		.08 mile
Operating income:				
Railway operations:				
Railway operating revenues	$94,718,966.52	$93,217,493.20	$1,501,473.32	.....
Railway operating expenses	64,865,394.56	62,643,935.11	2,221,459.45	.....
Net revenue from railway operations	$29,853,571.96	$30,573,558.09	.....	$719,986.13
Percentage of expenses to revenues	(68.48)	(67.20)	(1.28)	
Railway tax accruals	$6,392,709.84	$6,327,936.69	$64,773.15	.....
Uncollectible railway revenues	15,378.24	25,064.20	.....	$9,685.96
Railway operating income	$23,445,483.88	$24,220,557.20	.....	$775,073.32
Equipment rents, net debit	$918,125.46	$513,355.81	$404,769.65	.....
Joint facility rents, net debit	628,981.91	551,234.13	77,747.78	.....
Net railway operating income	$21,898,376.51	$23,155,967.26	.....	$1,257,590.75

Plaintiff's Exhibit 4—Continued

Operating income:	Year ended Dec. 31, 1929 1,858.34 miles operated	Year ended Dec. 31, 1928 1,858.42 miles operated	Increase	Decrease .08 mile
Miscellaneous operations:				
Revenues	$397,209.51	$403,831.95	.....	$6,622.44
Expenses and taxes	342,773.39	342,445.30	$328.09	.....
Miscellaneous operating income	$54,436.12	$61,386.65	.....	$6,950.53
Total operating income	$21,952,812.63	$23,217,353.91	.....	$1,264,541.28
Non-operating income:				
Income from lease of road	$249.35	$278.04	.....	$28.69
Miscellaneous rent income	290,829.60	327,663.24	.....	36,833.64
Miscellaneous non-operating physical property	52,989.24	73,525.62	.....	20,536.38
Dividend income	1,752,487.57	811,029.99	$941,457.58	.....
Income from funded securities	299,847.47	323,999.33	.....	24,151.86
Income from unfunded securities and accounts	705,984.96	480,742.61	225,242.35	.....
Miscellaneous income	12,404.50	15,125.89	.....	2,721.39
Total non-operating income	$3,114,792.69	$2,032,364.72	$1,082,427.97	.....
Gross income	$25,067,605.32	$25,249,718.63	.....	$182,113.31
Deductions from gross income:				
Rent for leased roads	$2,733,894.44	$2,736,593.38	.....	$2,698.94
Miscellaneous rents	6,417.23	4,158.76	$2,258.47	.....
Miscellaneous tax accruals	81,577.51	64,361.92	17,215.59	.....
Interest on funded debt	2,748,069.61	2,890,543.66	.....	142,474.05
Interest on unfunded debt	23,795.63	14,194.71	9,600.92	.....
Amortization of discount on funded debt	131,088.63	141,549.60	.....	10,460.97

Maintenance of investment organization	2,084.64	1,883.19	201.45	.....
Miscellaneous income charges	5,563.00	7,013.54	.....	1,450.54
Total deductions from gross income	$5,732,490.69	$5,860,298.76	.....	$127,808.07
Net income	$19,335,114.63	$19,389,419.87	.....	$54,305.24
Per cent to capital stock outstanding	(103.20)	(103.49)		(.29)
Disposition of net income:				
Dividends declared: 40 per cent each year	$7,494,560.00	$7,494,560.00	.....	.....
Surplus for the year carried to profit and loss	$11,840,554.63	$11,894,859.87	.....	$54,305.24

* * * * * * *

[fols. 208 & 209] Profit and Loss Account

Balance to credit of profit and loss, December 31, 1928.....		$93,731,696.99
Additions:		
Surplus for the year 1929.....	$11,840,554.63	
Profit on property sold.....	868,623.37	
Unrefundable overcharges.....	33,171.96	12,742,349.96
		$106,474,046.95
Deductions:		
Dividend appropriations of surplus....	$18,736,400.00	
Depreciation prior to July 1, 1907, on equipment retired during the year..	87,782.59	
Loss on property retired.....	119,439.59	
Miscellaneous items and adjustments (net).....	103,212.59	19,046,834.77
Balance to credit of profit and loss, December 31, 1929.....		$87,427,212.18

Operating Revenues

Freight revenue amounted to $64,484,363.45, an increase of $386,219.78.

Passenger revenue was $19,883,089.83, an increase of $90,523.06.

Mail revenue was $1,653,641.35, an increase of $538,-110.23.

Express revenue was $4,314,357.55, an increase of $274,-729.14.

Switching revenue amounted to $1,802,695.86, an increase of $133,919.79.

Other transportation, incidental and joint facility revenues increased $77,971.32.

Operating Expenses

The following table shows the operating expenses by groups:

Group	Amount	Increase	Decrease
Maintenance of way and structures.....	$10,060,358.74	$66,896.80	
Maintenance of equipment.....	19,798,575.41	1,369,163.45	
Traffic.....	1,657,291.53	57,702.86	
Transportation.....	29,916,401.02	501,503.33	
Miscellaneous.....	1,437,396.73	161,981.14	
General.....	2,092,332.22	90,799.55	
Transportation for investment—credit.....	96,961.09	.....	$26,587.68
Total.....	$64,865,394.56	$2,221,459.45	.....

The principal outlay contributing to the increase in expense for maintenance of way and structures is for the re-

moval of snow and ice, the result of the severe weather in December, 1929. There were partially offsetting decreases in charges for application of track material and for maintenance of bridges, trestles and culverts.

The increase of $1,369,163.45 in expense for maintenance of equipment is largely in freight car repairs. The number of freight cars repaired increased from 698,672 in 1928 to 787,483 in 1929.

Traffic expenses increased $57,702.86, chiefly in expense of off line representation.

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[fols. 210-212] PLAINTIFF'S EXHIBIT 5

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company

Report of the Board of Directors to the Stockholders for the Year Ended December 31, 1926

Cincinnati Ohio

* * * * * * *

[fol. 213] Income Account for the Year

	Year ended Dec. 31, 1926	Year ended Dec. 31, 1925	Increase	Decrease
	2,397.32 miles operated	2,391.46 miles operated	5.86 miles	
Operating income:				
Railway operations:				
Railway operating revenues	$94,539,987.16	$92,061,069.50	$2,478,917.66	
Railway operating expenses	70,058,664.78	67,001,481.50	3,057,183.28	
Net revenue from railway operations	$24,481,322.38	$25,059,588.00		$578,265.62
Percentage of expenses to revenues	(74.10)	(72.78)	(1.32)	
Railway tax accruals	$5,384,906.29	$5,534,374.26		$149,467.97
Uncollectible railway revenues	29,700.22	36,732.72		7,032.50
Railway operating income	$19,066,715.87	$19,488,481.02		$421,765.15
Equipment rents, net debit	$47,960.39	$91,940.41		$43,980.02
Joint facility rents, net debit	491,509.76	835,831.67		344,321.91
Net railway operating income	$18,527,245.72	$18,560,708.94		$33,463.22
Miscellaneous operations:				
Revenues	$12,117.26	$17,068.52		$4,951.26
Expenses and taxes	15,705.50	17,248.96		1,543.46
Miscellaneous operating deficit	$3,588.24	$180.44	$3,407.80	

Total operating income	$18,523,657.48	$18,560,528.50	.....	$36,871.02
Non-operating income:				
Miscellaneous rent income	$289,470.57	$283,376.72	$6,093.85	.....
Miscellaneous non-operating physical property	183,366.05	160,212.41	23,153.64	.....
Dividend income	312,643.90	371,275.90	.....	$58,632.00
Income from funded securities	409,411.06	514,579.10	.....	105,168.04
Income from unfunded securities and accounts	272,241.72	241,649.02	30,592.70	.....
Release of premiums on funded debt	536.85	694.10	.....	157.25
Miscellaneous income	22,394.10	24,553.31	.....	2,159.21
Total non-operating income	$1,490,064.25	$1,596,340.56	.....	$106,276.31
Gross income	$20,013,721.73	$20,156,869.06	.....	$143,147.33
Deductions from gross income:				
Rent for leased roads	$552,258.58	$587,730.84	.....	$35,472.26
Miscellaneous rents	209,310.80	216,722.03	.....	7,411.23
Miscellaneous tax accruals	25,000.00	19,800.00	$5,200.00	.....
Separately operated properties—loss	17,445.68*	145,584.26	.....	163,029.94
Interest on funded debt	7,484,057.92	7,450,884.60	33,183.32	.....
Interest on unfunded debt	76,342.11	41,107.87	35,234.24	.....
Amortization of discount on funded debt	269,143.81	269,730.19	.....	586.38
Maintenance of investment organization	744.32	331.45	412.87	.....
Miscellaneous income charges	19,016.48	17,452.48	1,564.00	.....
Total deductions from gross income	$8,618,438.34	$8,749,343.72	.....	$130,905.38
Net income	$11,395,283.39	$11,407,525.34	.....	$12,241.95
Disposition of net income:				
Dividends declared:				
On preferred stock, 5 per cent each year	$499,925.00	$499,925.00	.....	.....
On common stock, 7 per cent in 1926; 5½ per cent in 1925	3,292,009.00	2,586,578.50	$705,430.50	.....
Sinking funds	47,420.76	45,301.33	2,119.43	.....
Total appropriations of income	$3,839,354.76	$3,131,804.83	$707,549.93	.....
Surplus for the year carried to profit and loss	$7,555,928.63	$8,275,720.51	.....	$719,791.88

* Credit balance.

[fols. 214 & 215] Profit and Loss Account

Balance to credit of profit and loss, December 31, 1925		$44,125,299.62
Additions:		
Surplus for the year 1926	$7,555,928.63	
Accumulated unrefundable overcharges.	98,446.29	
Donations in aid of side track construction	4,314.30	
Profit on sale of land	30,776.11	
Unclaimed wages and pensions—year 1920	29,696.35	
Reacquirement of securities below par	8,866.90	
Profit on sale of Dayton and Union Railroad Company stock	69,917.24	7,797,945.82
		$51,923,245.44
Deductions:		
Surplus appropriated for investment in physical property	$32,892.30	
Depreciation prior to July 1, 1907, on equipment retired during year	126,638.84	
Road property retired and not replaced	397,301.50	
Adjustment of sundry accounts (net)	13,921.12	570,753.76
Balance to credit of profit and loss, December 31, 1926		$51,352,491.68

Operating Revenues

The total operating revenues were $94,539,987.16, an increase of $2,478,917.66.

Freight revenue was $70,367,477.79, an increase of $2,171,223.97.

Fluctuations in tons carried by principal groups were:

Products of agriculture	50,132 increase	= 1.88%
Animals and products	23,462 increase	= 3.45%
Products of mines	1,057,237 increase	= 3.49%
Products of forests	219,352 decrease	= 10.10%
Manufactures and miscellaneous	412,913 increase	= 4.99%
Less than car load merchandise	42,614 increase	= 3.38%
Total	1,367,006 increase	= 3.01%

Passenger revenue was $16,268,500.09, a decrease of $54,408.10. Local passengers decreased 231,824. Interline passengers increased 12,404 and commutation 9,998.

Mail revenue was $1,748,522.85, a decrease of $37,855.15. Although there was increased revenue from regular service, this did not overcome the loss incident to the discontinuance, April 1, 1925, of storage car service from Pier 72, New York to St. Louis via the company's line.

Express revenue was $2,373,369.22, an increase of $211,007.56, the result of an increased volume of business.

Other transportation and incidental and joint facility revenues were $3,782,117.21, an increase of $188,949.38, mainly the result of larger switching revenue following greater industrial activity at Cleveland and Cincinnati.

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[fols. 216-218]

PLAINTIFF'S EXHIBIT 6

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company

Report of the Board of Directors to the Stockholders for the Year Ended December 31, 1927

Cincinnati, Ohio

* * * * * * *

[fol. 219]

Income Account for the Year

	Year ended Dec. 31, 1927	Year ended Dec. 31, 1926	Increase	Decrease
Operating income:	2,396.52 miles operated	2,397.32 miles operated		.80 mile
Railway operations:				
Railway operating revenues	$91,185,736.88	$94,539,987.16	.....	$3,354,250.28
Railway operating expenses	70,322,698.77	70,058,664.78	$264,033.99	.....
Net revenue from railway operations	$20,863,038.11	$24,481,322.38	.....	$3,618,284.27
Percentage of expenses to revenues	(77.12)	(74.10)	(3.02)	
Railway tax accruals	$5,047,015.35	$5,384,906.29	.....	$337,890.94
Uncollectible railway revenues	15,462.22	29,700.22	.....	14,238.00
Railway operating income	$15,800,560.54	$19,066,715.87	.....	$3,266,155.33
Equipment rents, net debit	$501,462.05	$47,960.39	$453,501.66	.....
Joint facility rents, net debit	696,031.59	491,509.76	204,521.83	.....
Net railway operating income	$14,603,066.90	$18,527,245.72	.....	$3,924,178.82

Plaintiff's Exhibit 6—Continued

	Year ended Dec. 31, 1927	Year ended Dec. 31, 1926	Increase	Decrease
	2,396.52 miles operated	2,397.32 miles operated		.80 mile
Miscellaneous operations:				
Revenues	$10,725.49	$12,117.26	.....	$1,391.77
Expenses and taxes	16,395.03	15,705.50	$689.53	.....
Miscellaneous operating deficit	$5,669.54	$3,588.24	$2,081.30	.....
Total operating income	$14,597,397.36	$18,523,657.48	.....	$3,926,260.12
Non-operating income:				
Miscellaneous rent income	$284,566.30	$289,470.57	.....	$4,904.27
Miscellaneous non-operating physical property	174,027.41	183,366.05	.....	9,338.64
Dividend income	1,485,308.90	312,643.90	$1,172,665.00	.....
Income from funded securities	436,217.47	409,411.06	26,806.41	.....
Income from unfunded securities and accounts	307,070.13	272,241.72	34,828.41	.....
Release of premiums on funded debt	379.80	536.85	.....	157.05
Miscellaneous income	27,245.39	22,394.10	4,851.29	.....
Total non-operating income	$2,714,815.40	$1,490,064.25	$1,224,751.15	.....
Gross income	$17,312,212.76	$20,013,721.73	.....	$2,701,508.97
Deductions from gross income:				
Rent for leased roads	$583,318.13	$552,258.58	$31,059.55	.....
Miscellaneous rents	198,875.38	209,310.80	.....	$10,435.42
Miscellaneous tax accruals	27,000.00	25,000.00	2,000.00	.....
Separately operated properties—loss	668.22	17,445.68*	18,113.90	.....
Interest on funded debt	7,426,958.83	7,484,067.92	.....	57,109.09
Interest on unfunded debt	22,169.79	76,342.11	.....	54,172.32
Amortization of discount on funded debt	259,578.42	269,143.81	.....	9,565.39

Maintenance of investment organization	831.99	744.32	87.67	.....
Miscellaneous income charges	17,429.69	19,016.48	.....	1,586.79
Total deductions from gross income	$8,536,830.45	$8,618,438.34	.....	$81,607.89
Net income	$8,775,382.31	$11,395,283.39	.....	$2,619,901.08
Disposition of net income:				
Dividends declared:				
On preferred stock, 5 per cent each year	$499,925.00	$499,925.00	.....	.....
On common stock, 7¾ per cent in 1927; 7 per cent in 1926	3,644,724.25	3,292,009.00	$352,715.25	.....
Sinking funds	49,568.55	47,420.76	2,147.79	.....
Total appropriations of income	$4,194,217.80	$3,839,354.76	$354,863.04	.....
Surplus for the year carried to profit and loss	$4,581,164.51	$7,555,928.63	.....	$2,974,764.12

* Credit balance.

[fols. 220 & 221] Profit and Loss Account

Balance to credit of profit and loss, December 31, 1926		$51,352,491.68
Additions:		
Surplus for the year 1927	$4,581,164.51	
Profit on sale of land	196,596.26	
Unrefundable overcharges	60,135.42	
Donations in aid of side track construction	2,184.03	
Unclaimed wages and pensions—year 1921	4,323.76	
Reacquirement of securities below par	5,558.60	
		4,849,962.58
		$56,202,454.26
Deductions:		
Surplus appropriated for investment in physical property	$2,852.03	
Depreciation prior to July 1, 1907, on equipment retired during year	101,275.07	
Loss on property retired	199,468.96	
Uncollectible accounts and adjustments	30,050.39	
Miscellaneous items (net)	3,862.85	
		337,509.30
Balance to credit of profit and loss, December 31, 1927		$55,864,944.96

Operating Revenues

The total operating revenues were $91,185,736.88, a decrease of $3,354,250.28.

Freight revenue was $67,979,881.03, a decrease of $2,387,596.76.

Fluctuations in tons carried by principal groups were:

Products of agriculture	95,619 decrease	= 3.51%
Animals and products	78,953 increase	= 11.23%
Products of mines	838,764 decrease	= 2.67%
Products of forests	131,895 decrease	= 6.76%
Manufactures and miscellaneous	161,860 decrease	= 1.86%
Less than carload freight	9,849 decrease	= .76%
Total	1,159,034 decrease	= 2.48%

Passenger revenue was $15,570,226.82, a decrease of $698,273.27, of which $304,500.64 was interline, $382,738.10 local, and $11,034.53 commutation. There has been a steady increase in the average distance traveled per revenue passenger, as illustrated in the following table:

1910	54.0 miles
1920	74.9 miles
1925	104.8 miles
1926	109.4 miles
1927	113.8 miles

Mail revenue was $1,776,855.75, an increase of $28,335.90.

Express revenue was $2,374,521.48, an increase of $1,152.26.

Switching revenue was $1,062,951.46, a decrease of $130,453.11, largely the result of the coal strike.

Other transportation and incidental and joint facility revenues were $2,421,297.34, a decrease of $167,415.30.

* * * * * * *

[fols. 222-224] PLAINTIFF'S EXHIBIT 7

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company

Report of the Board of Directors to the Stockholders for the Year Ended December 31, 1928

Cincinnati, Ohio

* * * * * * *

[fol. 225] Income Account for the Year

	Year ended Dec. 31, 1928 2,397.25 miles operated	Year ended Dec. 31, 1927 2,396.52 miles operated	Increase .73 mile	Decrease
Operating income:				
Railway operations:				
Railway operating revenues	$88,830,152.40	$91,185,736.88	.....	$2,355,584.48
Railway operating expenses	66,989,154.90	70,322,698.77	.....	3,333,543.87
Net revenue from railway operations	$21,840,997.50	$20,863,038.11	$977,959.39	.....
Percentage of expenses to revenues	(75.41)	(77.12)	.....	(1.71)
Railway tax accruals	$4,928,865.04	$5,047,015.35	.....	$118,150.31
Uncollectible railway revenues	16,208.37	15,462.22	$746.15	.....
Railway operating income	$16,895,924.09	$15,800,560.54	$1,095,363.55	.....
Equipment rents, net debit	$847,294.35	$501,462.05	$345,832.30	.....
Joint facility rents, net debit	426,092.15	696,031.59	.....	$269,939.44
Net railway operating income	$15,622,537.59	$14,603,066.90	$1,019,470.69	.....
Miscellaneous operations:				
Revenues	$12,509.03	$10,725.49	$1,783.54	.....
Expenses and taxes	17,254.63	16,395.03	859.60	.....
Miscellaneous operating deficit	$4,745.60	$5,669.54	.....	$923.94
Total operating income	$15,617,791.99	$14,597,397.36	$1,020,394.63	.....

Non-operating income:				
Miscellaneous rent income	$289,191.29	$284,566.30	$4,624.99	.....
Miscellaneous non-operating physical property	163,000.90	174,027.41	.....	$11,026.51
Dividend income	387,656.40	1,485,308.90	.....	1,097,652.50
Income from funded securities	551,579.19	436,217.47	115,361.72	.....
Income from unfunded securities and accounts	556,338.59	307,070.13	249,268.46	.....
Release of premiums on funded debt	223.15	379.80	.....	156.65
Miscellaneous income	23,942.88	27,245.39	.....	3,302.51
Total non-operating income	$1,971,932.40	$2,714,815.40	.....	$742,883.00
Gross income	$17,589,724.39	$17,312,212.76	$277,511.63	.....
Deductions from gross income:				
Rent for leased roads	$417,510.71	$583,318.13	.....	$165,807.42
Miscellaneous rents	198,272.67	198,875.38	.....	602.71
Miscellaneous tax accruals	75,050.00	27,000.00	$48,050.00	.....
Separately operated properties—loss	92,224.27	668.22	91,556.05	.....
Interest on funded debt	7,697,785.93	7,426,958.83	270,827.10	.....
Interest on unfunded debt	18,343.31	22,169.79	.....	3,826.48
Amortization of discount on funded debt	252,400.18	259,578.42	.....	7,178.24
Maintenance of investment organization	527.57	831.99	.....	304.42
Miscellaneous income charges	17,786.58	17,429.69	356.89	.....
Total deductions from gross income	$8,769,901.22	$8,536,830.45	$233,070.77	.....
Net income	$8,819,823.17	$8,775,382.31	$44,440.86	.....
Disposition of net income:				
Dividends declared:				
On preferred stock, 5 per cent each year	$499,925.00	$499,925.00	.....	.....
On common stock, 8 per cent in 1928; 7¾ per cent in 1927	3,762,304.00	3,644,724.25	$117,579.75	.....
Sinking funds	51,700.44	49,568.55	2,131.89	.....
Total appropriations of income	$4,313,929.44	$4,194,217.80	$119,711.64	.....
Surplus for the year carried to profit and loss	$4,505,893.73	$4,581,164.51	.....	$75,270.78

[fols. 226-227] Profit and Loss Account

Balance to credit of profit and loss, December 31, 1927		$55,864,944.96
Additions:		
Surplus for the year 1928	$4,505,893.73	
Profit on sale of land	11,954.34	
Unrefundable overcharges	11,655.16	
Donations in aid of side track construction	48,286.11	
Unclaimed wages and pensions—year 1922	11,904.45	
Reacquirement of securities below par	5,348.30	4,595,132.09
		$60,460,077.05
Deductions:		
Surplus appropriated for investment in physical property	$197,760.61	
Depreciation prior to July 1, 1907 on equipment retired during year	119,093.74	
Loss on property retired	190,729.24	
Amount previously carried as advances to Central Indiana Railway Company including interest	259,225.95	
Uncollectible accounts and miscellaneous items (net)	7,400.67	774,210.21
Balance to credit of profit and loss, December 31, 1928		$59,685,866.84

Road Operated

The mileage covered by this report is as follows:

	1928 Miles	1927 Miles	Comparison Miles
Main line and branches owned	1,694.82	1,694.09	.73 Increase
Leased lines	202.83	202.83	...
Lines operated under contract	328.99	328.99	...
Lines operated under trackage rights	170.61	170.61	...
Total road operated	2,397.25	2,396.52	.73 Increase

The additional 73/100ths of a mile of line owned is due to an increase of 77/100ths of a mile resulting from restoration to road service of track in Indianapolis and a decrease of 4/100ths of a mile following relocations.

Operating Revenues

The total operating revenues were $88,830,152.40, a decrease of $2,355,584.48.

Freight revenue was $67,594,293.43, a decrease of $385,587.60.

Fluctuations in tons carried by principal groups were:

Products of agriculture	317,978 increase	= 12.11%
Animals and products	31,073 increase	= 3.97%
Products of mines	1,717,403 decrease	= 5.62%
Products of forests	23,045 decrease	= 1.27%
Manufactures and miscellaneous	556,282 increase	= 6.53%
Less than carload freight	59,986 increase	= 4.64%
Total	775,129 decrease	= 1.70%

Passenger revenue was $14,558,356.23, a decrease of $1,011,870.59. This decrease in revenue divides as follows:

Interline passengers decrease	$187,408.11
Local passengers decrease	825,469.44
Commutation passengers increase	1,006.96

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[fol. 228] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

E 50133

NEW YORK CENTRAL SECURITIES CORPORATION, Petitioner, against

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, New York Central Railroad Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and The Michigan Central Railroad Company, Defendants

Before Mack, Circuit Judge; Woolsey and Coxe, District Judges

Petition by stockholder in lessor and lessee corporations to annul and set aside orders of Interstate Commerce Commission approving leasing of railroad properties and authorizing assumption of security obligations by lessee.

Messrs. House, Grossman & Vorhaus—Frederick A. Henry, Esq., and Joseph Fischer, Esq., of counsel—solicitors for the petitioner.

Jacob Aronson, Esq.—Crosby J. Beakes, Esq., and James L. Homire, Esq., of counsel—solicitors for defendants New York Central, the Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., and the Michigan Central Railroad.

David W. Knowlton, Esq., solicitor and counsel for defendant Interstate Commerce Commission.

George Z. Medalie, Esq., United States Attorney—Elmer B. Collins, Esq., Special Assistant to the Attorney General, of counsel—for the United States.

OPINION—Filed May 20, 1931

MACK, J.:

This is a petition under the Urgent Deficiencies Act (38 Stat. 208, 219-20) 28 U. S. C. §§ 46, 47, to annul and set aside two orders of the I. C. C., relating to railroad leases, brought by a minority stockholder of each of the lessor [fol. 229] companies and of the lessee company. The order

of July 2, 1929 (150 I. C. C. 278; 154 I. C. C. 489)[1] authorized acquisition of control, through leasing, by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (the "Big Four") of the properties of the Cincinnati Northern and of the Evansville, Indianapolis and Terre Haute lines and acquisition of control, through leasing, by the New York Central Railroad of the systems of the "Big Four", the Michigan Central and of the Chicago, Kalamazoo and Saginaw Railway Company; the terms of the leases were approved by the Commission. The order of December 2, 1929 (158 I. C. C. 317)[2] authorized the "Big Four" to assume obligation and liability under the leases as to securities of its lessors, and the New York Central to assume like obligation and liability as to securities of its lessors, including the "Big Four". The first order was made pursuant to § 5 (2)[3], the second to § 20 a[4] of the Transportation Act of 1920, 49 U. S. C.

[fol. 230] At the time of the first order, the New York Central owned, directly or through a subsidiary, 99.19 per

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[1]Finance Docket No. 5690, New York Central Unification.

[2]Finance Docket No. 7744, Assumption of Obligation & Liability by New York Central; F. D. No. 7745, Assumption of Obligation & Liability by Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.

[3]§ 5 (2) (a) Acquisition of control of one carrier by another. Whenever the commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this chapter, that the acquisition, to the extent indicated by the commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the commission to be just and reasonable in the premises.

[4]§ 20 a (2) Issuance of securities; assumption of obligations; authorization. It shall be unlawful for any carrier

cent of the stock of the Michigan Central, 100 per cent of the stock of the Kalamazoo and of the Terre Haute, and 97.72 per cent of the stock of the Cincinanti Northern. It also held 91.31 per cent of the common stock and 84.69 per cent of the preferred stock of the "Big Four"; the increase of its holdings of the common stock from sixty four per cent in 1922, had been with the approval of the Commission. Control of Big Four by New York Central, 72 I. C. C. 96. The New York Central and its subsidiaries have common executives; thirteen of the fifteen directors of the "Big Four" and Michigan Central are also directors of the New York Central.

The proposed leases are for ninety-nine years, and include assignment by the lessors to the lessee of income from securities. The lessee agrees to maintain the lessors' corporate existence and to pay interest and other charges; further, to pay to the holder of each share of the capital stock of the lessors, not owned by the lessee, a specified amount as annual rental dividends. If unwilling to accept the rentals stipulated, the minority stockholders of

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to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

the lessors have the alternative stipulated right to sell their stock to the lessee at values to be fixed by arbitrators; in the determination of the values, the effect of the leases is to be considered or disregarded at the option of the stockholder.

[fol. 231] As a condition to the authorization of the leases, the Interstate Commerce Commission required the acquisition of certain intervening short lines by the New York Central, on the ground of public interest. These lines have been so acquired (154 I. C. C. 489). Sixty-two other short lines, which connect with the unified system, did not intervene; the Commission decided that for the present, at least, their acquisition was not a prerequisite to authorization of the leases.

Plaintiff corporation owns stock in the New York Central, the "Big Four", and the Michigan Central. It asserts its interest as a minority stockholder in each of them. Having intervened unsuccessfully in the application before the Commission, it filed its original petition, after entry of the order in Finance Docket No. 5690, and a supplemental petition, after entry of the order in Finance Docket No. 7744. The United States, the Commission, and the defendant railroads have moved to dismiss for lack of jurisdiction and have also filed answers on the merits.

(1) At the threshold, we are met with the defendant's contention that plaintiff has no standing to sue because as a minority stockholder in each corporation, its interest is not distinct from that of the respective defendant corporations, and its remedy, therefore, is by a stockholders' bill "in a suit involving the plenary equity jurisdiction of the District Court". See Pittsburgh and West Virginia Ry. v. United States, 281 U. S. 479, 486. And compare Sprunt & Son v. United States, 281 U. S. 249; Hines v. United States, 263 U. S. 143.

[fol. 232] Plaintiff is a minority stockholder in two aspects. A. As a minority stockholder in the lessee corporation, its objection that the acquisition of the short lines adversely affected that corporation would not, standing alone, be heard in this suit, for clearly plaintiff cannot have sustained any injury in this respect other than indirectly through the lessee corporation. Pittsburgh & West Virginia Ry. v. United States, supra p. 487. B. As a minority stockholder of lessor corporations, however, its

alleged injury is not merely derivative through its ownership of stock, but is an independent injury to itself as a member of a class created by the leasing agreements between lessors and lessee. The payments of rental dividends are to be made directly to the minority stockholders of the lessors; no payment is made by the lessee to itself as stockholder of the lessors, nor is any rental payment in the form of guaranteed annual dividends paid to the lessor corporations for distribution to their minority stockholders. The minority stockholders are, in effect, third party beneficiaries of the authorized lease agreements, and, as such, have an independent interest, even though, because of dissatisfaction with the provisions, they may be unwilling to assert the rights accorded to them thereunder. The controversy, moreover, is not merely an ordinary internal fight between minority and majority, for the New York Central itself is the majority in the lessors, and, as such, has an interest adverse to the minority stockholders of the lessors. Our conclusion is supported by the express statement in Pittsburgh and West Virginia v. United States, (supra at 487) that in some cases of acquisition and control, the order does deal with "the interests of investors" as distinguished from their interests merely as minority stockholders in their corporation.[5] In the Pitts- [fol. 233] burgh case, a petition was filed to annul an order of the Interstate Commerce Commission granting a certificate of public convenience under § 1 (18). The present suit challenges orders made under §§ 5 (2) and 20a. In the former case, the minority stockholder had no standing except through its corporation; in the latter, as in reorganizations, the minority acquired by the leases a new interest of a substantially independent character pursuant to the authority granted by the Commission. The motion to dismiss for lack of jurisdiction must therefore be denied.

The plaintiff argues upon somewhat inconsistent grounds. On the one hand, it asserts that since there is already control through stock ownership and interlocking directorates the leases add nothing to the status quo ante

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[5] Mr. Justice Brandeis cited as an example of such "acquisition of control", New York Central Unification, 150 I. C. C. 278, the very matter now before us. 281 U. S. at 487, note 8.

the orders, and that the Commission is therefore, without power to grant the authority on the basis of "public interest." On the other hand, it urges that the leases, added to the existing stock control, effect a "consolidation" within the prohibition of § 5 (2).

First. Similar contentions have been overruled by the Interstate Commerce Commission in a series of decisions.[6] Continuous departmental practice under a statute is a weighty consideration in the determination by the Courts of nice questions of construction. See Logan v. Davis 233 U. S. 627.

[fol. 234] On the matter here presented, we are entirely in accord with the Commission. The statute permits acquisition (on a finding of public interest) by lease, by purchase of stock, "or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation". There is no express limitation on the authority to permit such acquisition by lease when stock ownership already gives control. Nor does the control by lease for ninety nine years involve a "consolidation" within the intendment of the statute. Section 5 (6) makes it "lawful for two or more carriers by railroad, subject to this chapter, to consolidate their properties, or any part thereof, into one corporation for the ownership, management and operation" under certain conditions. Section 5 makes a clear distinction between "acquisition of control" and "consolidation". The latter is qualified in § 5 (2) by "a single system for ownership and operation", and in § 5 (6) by "into one corporation". Apparently the "consolidation" so qualified is the consolidation prohibited under § 5 (2). Construing the several subdivisions of § 5 together, it is clear that Congress laid down no test for consolidation other than ownership by one corporate en-

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[6] See Control of El Paso & S. W. System, 90 I. C. C. 732; Control of Alabama & Vicksburg, etc., 111 I. C. C. 161, 169; Lease of Pan Handle, 72 I. C. C. 128, 133; New York Central Leases, 72 I. C. C. 243; Control of Central Pacific, 76 I. C. C. 508. And cf. Nickel Plate Unification, 105 I. C. C. 425, 430. See cases cited in Swaine, Reorganization of Corporations, 28 Columbia L. Rev. 29, 46 note 176; Simpson, Interstate Commerce Commission and Railroad Consolidation, 43 Harvard L. Rev. 192, 211 note 73.

tity; anything short of this cannot be deemed a consolidation within the qualification of subdivision two.

The danger that the ultimate consolidation plan will subsequently require the unscrambling of properties so unified does not affect this construction. The same objection might have been urged against allowing acquisition of control by lease or by the purchase of stock; yet, clearly such modes of acquisition in the alternative, are authorized in unequivocal terms by the Transportation Act. Nor can it be doubted that the consolidation plan will, in any event, compel important changes in the financial set-up of the [fol. 235] carriers of the country; the Commission, charged with the preparation of the plan of consolidation, was entrusted with the task of considering applications for acquisition of control short of corporate consolidation. The criterion of "public interest" was evidently deemed an adequate limitation on approval of acquisitions inconsistent with the consolidation plan in the process of formulation. The approval here challenged was, therefore, within the jurisdiction of the Commission upon a justified finding that it was "in the public interest".

Second. Plaintiff argues that the lessor and lessee properties are competing parallel lines, joint control of which is proscribed under the Anti-Trust Laws, that the Commission is without power to exempt carriers from the operations of these laws, and that if § 5 (8) of the statute be deemed to confer such power upon the Commission, it is unconstitutional as an attempted delegation of legislative power. We need not determine whether some of the lines here involved are "parallel and competing", for assuming that they are, the power of the Commission is not thereby restricted. Section 5 (8) in express terms refers to carriers affected by any order under § 5 and provides that such carriers "are relieved" from the operation of the anti-trust laws. In other words, it is not the duty of the Commission to choose particular carriers as subjects for exemption; the Commission merely determines applications for acquisition and control under § 5 (2) in the light of the public interest, and Congress thereupon attaches the exemption of the statute expressed in § 5 (8). In this respect, § 407 of the Transportation Act 49 U. S. C. § 5 (8) differs from § 12 of the Panama Canal Act (Act of Aug. 24, 1912 c. 392, 37 Stat. 566, 49 U. S. C. § 5 (12)). Under

the Panama Canal Act, the Commission was authorized to select carriers for specific exemption from the prohibitions of the statute preserving competition; this was held valid. [fol. 236] Lehigh Valley v. United States, 234 Fed. 682, aff'd on another ground, 243 U. S. 412. Even if the Transportation act § 5 (8) were construed, therefore, to confer upon the Commission authority to grant exemptions from the operation of the Anti-Trust Laws, it would not, in the light of the whole section, be void as a delegation of legislative power. Since an executive officer may be empowered to make regulations to which criminal penalties attach (United States v. Grimaud, 220 U. S. 506), the Commission may be similarly empowered to make orders which prevent criminal penalties from attaching. Compare, the Laura, 114 U. S. 411.

Nor is the standard of judgment, "in the public interest" provided for the Commission, too vague. The power of the Interstate Commerce Commission to regulate rates and to prevent unjust preferences and discriminations, to exempt carriers from "long and short haul provisions", and to control car service in the public interest is no longer open to question.[7] Standards no more precise than that films be found "moral, educational or amusing and harmless" (Mutual Film Corp. v. Ohio Industrial Comm., 236 U. S. 230); or that imported teas be pure (Buttfield v. Stranahan, 192 U. S. 470); or requiring a finding of foreign discrimination (The Brig Aurora, 7 Cranch 382; Field v. Clark, 143 U. S. 649; and cf. Hampton & Co. v. United States, 276 U. S. 394); or that an alien is an "undesirable resident" (Mahler v. Eby, 264 U. S. 32) have all been sustained as against a similar contention of invalidity. We find plaintiff's contention in this respect wholly without merit.

[fol. 237] Third. Plaintiff urges that the dividend rentals are, as a matter of law, inadequate and unreasonable. No direct claim of confiscation is alleged. In view of the fact that the lessee is the majority interest in the lessor cor-

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[7] Interstate Commerce Comm. v. Chicago, Rock Island & Pac. Ry., 218 U. S. 88; Interstate Commerce Comm. v. Illinois Central Ry., 215 U. S. 455; The Intermountain Rate Cases, 234 U. S. 476, Avent v. United States, 266 U. S. 127.

porations, the transaction compels careful scrutiny. (150 I. C. C. 314; 105 I. C. C. 425; cf. Farmers' L & T Co. v. N. Y. & N. H. Co., 150 N. Y. 410; Bond v. N. Y. & H. R. Ry. 220 Fed. 174, 181). The situation was adequately presented to the Commission by the intervention of the present plaintiffs.

Adequacy of rental dividends depends upon a valuation of stockholders' equities in the light of normal returns upon similar properties. This matter, like that of valuation for rate-making purposes, is peculiarly within the competence of an expert tribunal.

We do not substitute our own judgment for that of the Commission. The Transportation Act specifically empowers this body to authorize acquisitions in the public interest "for such consideration and upon such terms and conditions as seem to it just and reasonable in the premises." (§ 5 (2)) The scope of our review is limited to an inquiry as to whether the Commission acted arbitrarily. Upon the extensive record before the Commission and in view of the difficulties inherent in railroad valuation, particularly as it affects a determination of guaranteed rentals over a long term of years, we hold that the Commission did not abuse its discretion in authorizing the leases on the terms therein specified. They provide for a guaranteed rental for ninety nine years of $10 per share of the "Big Four" Common and $50 per share of the Michigan Central, amounting to a return of 4.9 per cent and 7.8 per cent respectively on the stockholders' equity per share, as of November 1, 1927. This compares with the average dividend payment made for five and six years previously of $5.30 and $23.20, amounting to a [fol. 238] return of approximately 2.9 per cent and 2.8 per cent on the estimated market price per share in the same period.[8] On the basis of the market value per share determined by the same method, the return of the guaranteed dividend rentals on such market value would be 5.6 per cent

[8] The estimated market value per share was determined by using as a standard of comparison the ratio of net earnings to average market value of the stocks of certain major carriers of the country over a period of years. With this was also compared the ratio of guaranteed dividends to market value of railroad stocks, affording some indication that the guaranteed rental might result in an appreciation in market value of Big Four stock held by the minority.

and 6 per cent. Although the average net earnings [9] exceed the rentals guaranteed, the latter cannot be held inadequate, for accumulation of surplus is essential in railroad financing. Moreover, the leases provide for a sale of their stock to the lessee by the minority at a valuation determinable by arbitrators; in such valuation the effect of the leases is to be considered or disregarded at the option of the stockholder. The uncertain character of future net earnings for ninety-nine years, so strikingly illustrated by recent economic upheavals, and the contingent limitations upon return from railroad properties in view of § 15a of the Transportation Act, command caution in the guarantee of dividends in the form of rental. The public interest is the paramount consideration, and although the interests of stockholders must not be ignored, (see Cleveland, C. C. & St. Louis Ry. v. Jackson, 22 F. (2d) 509; Nickel Plate Unification, 105 I. C. C. 425), the plaintiff has in our judgment failed to prove its claim of gross inadequacy.[10]

[fol. 239]

	1 Stockholders' equity per share Nov. 1, 1927	2 Market value by method of note 8[1]	3 Average net earnings per share[2]	4 Average dividend payments per share	5 Rentals under the leases
Big Four...	$201.75	$179.75[3]	$19.86	$5.30[4]	$10.00
Michigan Central..	639.78	827.25[3]	85.78	*23.20	50.00

	6 Ratio of dividend payments to net income available[5]	7 Ratio of rentals to average net earnings	8 Ratio of rentals to stockholders' equity per share	9 Ratio of average dividend payments to value under note 8	10 Ratio of rentals to value under note 8
Big Four...	25%	50%	4.9%	2.9%	5.6%
Michigan Central..	*24%	58%	7.8%	*2.8%	6%

* Exclusive of extra dividend of 50% of accumulated surplus in 1927.
[1] Including New York Central Lines.
[2] Average for 1924-27, computed on basis of ratio of earnings to market value of major carriers, 1915-1925.
[3] Average for 1922-27.
[4] Average for 1922-26.
[5] Found by Commission for 1921-26.

[9] The significant figures on the adequacy of the rentals are set forth in the tabular form attached.

[10] It should be noted that the only Commissioner who reached a contrary result on the question of guaranteed rentals considered them contrary to the public interest because excessive. 150 I. C. C. 324.

[fol. 240] The finding of public interest is sufficiently supported by the evidence before the Commission. Although the fixed charges incident to long term leasing generally make that method undesirable, the objection is minimized in the present case by the relatively small fixed charges contemplated in the payments to the minority [11] as against the economies sought to be effected by the unification. The changes contemplated under the unification affect (a) traffic (b) transportation (c) accounting (d) repair of equipment. The suggested advantages include (a) revision of routes subject to the approval of the Commission, including short-hauling by the lessor roads, and the use of shorter or alternative routes; rates of the traffic units would be interchangeable; (b) possible new routes, through some physical improvements, (a study indicated a potential aggregate saving of 11,796,789 car miles per year through direct routing, or at present car mile costs, of about one million dollars per year); (c) adoption of a unifield accounting system in place of the detailed accounting now required (d) indefinitely deferring contemplated extensions of repair shops to cost seven million dollars by the use of presently available "Big Four" facilities.

On these considerations, the Commission found public benefit. We cannot say that the tribunal which deals with the problems of carriers from day to day is too credulous in [fol. 241] the face of these estimates of economies; its judgment thereon is informed by an experience which courts seldom have. In the light of the evidence, we cannot hold the finding of public interest to be arbitrary; with the weight of the evidence we are not concerned. Virginian Ry. v. United States, 272 U. S. 658; Colorado v. United States, 271 U. S. 153.

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[11] Maximum annual payments on present minority holdings would be as follows:

Stock	No. of shares involved	Div. rate or rental	Amt. payable as rental
Big Four, preferred	15,304	5 per cent	$76,520
Big Four, common	40,876	10 per cent	408,760
Michigan Central	1,523	50 per cent	76,150
			*$561,430

* Not including amounts payable under collateral trust indenture to Guaranty Trust Co.

Fourth. The authorization by the Commission of the leases upon the condition that intervening short lines be acquired is attacked on the ground that the attaching of the condition was beyond the power of the Commission. Plaintiff's contention is made by it as a stockholder of the New York Central. The argument is that the Commission, as a body of limited jurisdiction, must find statutory authority for its action. With this we agree, but we find that ample power has been conferred. Section 5 (2) authorizes approval of acquisition on such terms and conditions as the Commission finds just and reasonable. Section 20(a) empowers the Commission, among other things, "to grant it (the application) with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises." The order was permissive. The New York Central no longer objects to the condition (154 I. C. C. 489) and the plaintiff cannot challenge the judgment of its corporation in this proceeding. Pittsburgh & W. Va. Ry. v. U. S. supra. United States v. Chicago, etc., Ry., 282 U. S 311 casts no doubt upon the power of the Commission to make its orders upon some conditions; in that case the court held that the condition imposed was unrelated to regulation of commerce Here the condition directly affects commerce, for the short lines had a substantial interest in the plan of unification. Chicago Junction Case, 264 U. S. 258.

Fifth. The orders of the Commission are further attacked on the ground that the leases as authorized are invalid [fol. 242] under the law of Ohio. The original petition alleged the invalidity of the leases; the supplemental petition challenges the power of the Commission to authorize the assumption of security obligations on the ground that such assumption is not "for some lawful object within its corporate purposes" (§ 20a) because in contravention of the statute of Ohio (set out in the margin).[12] The

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[12] General Code, Ohio, § 8809, reads: "In case of the lease of a railroad situated in whole or in part within this state, the rental reserved and secured for the leased road shall be equal, at least to its net earnings for the fiscal year next preceding the one in which the lease is made."

The New York Central and the "Big Four" are incorporated in Ohio, as well as in other states; they own and operate railroad property in that state. The rentals are admittedly less than the net earnings for the preceding year. Plaintiff contends that the approval of the lease under § 5 (2) cannot supply the lack of power in the corporation to make such a lease; and that the approval of the assumption of security obligations under § 20 a is beyond the power of the Commission because of the express statutory limitation that the assumption be "within its corporate purposes." The first objection is in substance, that it was ultra vires the corporation to execute these leases. While the fact that the order was permissive rather than mandatory does not deprive the Court of jurisdiction in this proceeding (Chicago Junction Case, 264 U. S. 258), the attack based upon the State law limitation of the corporate power has no proper place in a suit to annul the order. Pittsburgh v. W. Va. Ry. v. United States, 281 U. S. 479, 488, and cf. Cleveland etc. Ry. v. United States, 275 U. S. 404. The controversy as such is between the corporation and the minority stockholders.

[fol. 243] The second objection, however, is based on the statutory power of the Commission. It can no longer be doubted that under its constitutional power to regulate interstate commerce, Congress may disregard prohibitions affecting such commerce, imposed by the states. New York v. United States, 257 U. S. 591; Colorado v. United States, 271 U. S. 153. It may also, under the same constitutional grant of power, confer upon corporations created under State statutes, powers not conferred by state charter. New York v. United States, supra; R. R. Comm. v. C. B. & Q. R. R., 257 U. S. 563. See California v. Central Pacific Ry., 127 U. S. 1; Southern Pacific Ry. v. United States, 183 U. S. 519 In the instant case, moreover, the power to lease is granted by the Ohio Statute; the statute merely places a restraint upon the exercise of the power. Though in the original statute (70 Ohio Laws 129, §24) the restraint was in the form of a proviso on the power to lease, the code now in force deals with the minimum rental in a separate section. In our judgment, the power to lease is separable from the rental to be paid. Nor has the State of Ohio asserted any claim of ultra vires on its own behalf (see

Cleveland etc. Ry. v. United States 275 U. S. 405, 414) although it was apparently notified of the pendency of the order as provided in §20 a. We consider the corporate power unaffected by the limitation thereon.

Regardless, however, of whether or not the statutory provision as to the rentals in a lease is in effect as well as in form merely a limitation on the granted power to lease, Congress has exercised its control in the field of railroad securities. See Colorado v. United States 271 U. S. 153, 165; R. R. Comm. v. So. Pac. Ry., 264 U. S. 331. The authority to approve acquisition of control by lease is conferred upon the Commission by §5 (2); the "exclusive jurisdiction" to authorize issuance of securities and the [fol. 244] assumption of security obligations is conferred by §20 a.[13] The limitation as to "corporate purposes", as evidenced by the legislative history of the section, is not a limitation based upon the charter powers of the corporation.[14] The statute manifestly was meant to draw within

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[13] 20 a (7) provides: "The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein"

[14] §20 a (7) of the Esch-Pomerene Bill of June 2, 1919 (66th Cong., 1st Sess. H. R. 4378, S. No. 1256) and substantially in §24 of the Cummins Bill of Aug. 23, 1919 (66th Cong. 1st sess. S. No. 2906): it was not contained in earlier bills. Later it became § 437 of the next Esch Bill (66th Cong. 1st Sess., H. R. No. 10453), which was §439 of the Conference Bill. On Nov. 17, 1919 an amendment was offered in the House to strike out this paragraph and to provide that no securities should be issued under the Act "except in the manner and form prescribed by the laws of the state which created such common carrier, and that this section of the Act shall not be construed as a limitation of state authority, but only as cumulative thereof." This amendment was defeated after debate. (Cong. Rec., 66th Cong. 1st Sess. Vol. 58, pt. 9, pp. 8673-8676).

The theory of the legislation was explained by both Senator Cummins and Representative Esch. Senator Cum-

the federal control the complete regulation of the railroad securities, unhampered by state action or restriction. [fol. 245] When Congress has entered upon a field directly related to interstate commerce, restrictions imposed by the states that directly affect the federal regulation are of no further validity. That the proposal emanates from the carriers rather than from the Commission is, of course, not material; even in the ultimate consolidation contemplated under §5, proposals under the Act are generally initiated by the carriers themselves.

Sixth. Plaintiff contends that the lease of the Michigan Central was not duly authorized, because the stock thereof owned by the New York Central is pledged under a trust agreement which requires the consent of seventy-five per

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mins reported regarding §24 of his bill: "But I think there is no real opposition to a provision which confers upon the Interstate Commerce Commission or some other Federal agency the supervision of the issuance of railway securities, in that way relieving railway companies of the regulation of forty of the forty-eight states of the Union * * * This is intended to concentrate that power in the hands of a Federal tribunal." (Cong. Rec. 66th Cong. 2d Sess., vol. 59, pt. 1, pp. 137-8).

Mr. Esch reported to the House: "Without Federal control, the carriers would have to be subjected to the diversified requirements of the several states * * *. The enactment of the pending bill will put the control over stock and bond issues exclusively in the hands of the Federal Government and will result in uniformity and greater promptness of action." (66th Cong., 1st sess. House Report, No. 457, Nov. 10, 1919).

It is significant, moreover, that the phrase "corporate purposes" originally read "corporate powers" in the Esch-Pomerene Bill. The change was apparently made at the suggestion of Counsel for the Association of Railway Executives who pointed out that "powers" might be construed to mean state powers; to avoid the misconstruction, "purposes" was substituted. (Hearings before House Committee on Interstate and Foreign Commerce, 66th Cong., 1st sess., H. R. 4378, pt. 8, p. 1267.

cent of the bondholders and this was not obtained. Suffice it to say that plaintiff is not a party in interest under the agreement. The danger of subsequent action by the bondholders is too remote.

The temporary injunction must be denied and the petition to set aside and annul the orders of the Interstate Commerce Commission must be dismissed at petitioner's costs.

Julian W. Muck, Circ. J. John M. Woolsey, D. J.
Alfred C. Coxe, D. J.

[File endorsement omitted.]

[fol. 246] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The issues raised by the petition and supplemental petition herein under the Urgent Deficiencies Act (38 Stat. 208, 219-20) 28 U. S. C. Sections 46, 47, to annul and set aside two orders of the Interstate Commerce Commission, and by the answers and supplemental answers of the respective defendants, having come on for final hearing before this Court, on the Equity Side thereof, before the Honorable Julian W. Mack, Circuit Judge and the Honorable Alfred C. Coxe and the Honorable John Munro Woolsey, District Judges, on the 7th day of March, 1931, and the allegations and evidence of the parties having been heard; Now, after hearing counsel for the petitioner and for the defendants and due deliberation having been had, we find and decide as follows:

[fol. 247] Findings of Fact

1. That the New York Central Securities Corporation, the petitioner herein, is a Delaware corporation with its principal operating office in the City, County and State of New York.

2. That the New York Central Securities Corporation and Clarence H. Venner are the holders of record of shares of the capital stock, respectively, of The New York Central Railroad Company, The Michigan Central Railroad Company and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.

3. That the defendant, The United States of America, is a party herein pursuant to the provisions of Section 46 of Chapter 2, Title 28, United States Code, being Section 208 of the Judicial Code.

4. That the defendant, The New York Central Railroad Company, hereinafter sometimes referred to as the New York Central, is a consolidated railroad corporation organized and existing under the laws of the States of New York, Pennsylvania, Ohio, Indiana, Michigan, and Illinois; is a citizen and resident of each of said states; owns and operates lines of railroads therein in interstate commerce as a common carrier; and has a principal operating office in the Cty, County and State of New York.

5. That the defendant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, hereinafter sometimes [fol. 248] referred to as the Big Four, is a consolidated railroad corporation, organized and existing under and by virtue of the laws of the States of Ohio and Indiana; is a citizen and resident of each of said states; and owns a railroad therein and extending into Illinois and Michigan, with trackage rights in certain other states.

6. That the defendant, The Michigan Central Railroad Company, hereinafter sometimes referred to as the Michigan Central, is a railroad corporation organized and existing under and by virtue of the laws of the State of Michigan; is a citizen and resident of that state; and owns a railroad therein extending into certain other states and the Dominion of Canada, with trackage rights in certain other states.

7. That on July 29th, 1926, the Big Four filed with the Interstate Commerce Commission, hereinafter sometimes called the Commission, an application recorded in Finance Docket No. 5688 for authority to acquire control, under lease, of the railroads and properties of The Cincinnati

Northern Railroad Company and Evansville, Indianapolis & Terre Haute Railway Company, and concurrently therewith the New York Central filed with the Commission an application recorded in Finance Docket No. 5690 for authority to acquire control, under lease, of the railroad systems of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (including the Cincinnati Northern Railroad and the Evansville, Indianapolis & Terre Haute Rail-
[fol. 249] way), of The Michigan Central Railroad Company, and of the Chicago, Kalamazoo & Saginaw Railway Company; and that in and by said applications the respective applicants therein named, pursuant to the provisions of Paragraph 2 of Section 5 of the Interstate Commerce Act, as amended, sought to obtain the approval and authorization by the Commission of the acquisition of control under leases for the terms of ninety-nine years of the aforesaid respective railroads and railroad systems, upon the terms and conditions and for the considerations stated in the proposed leases which were attached to and made a part of said applications.

8. That thereafter the said Commission held hearings upon notice duly given as required by the provisions of the Interstate Commerce Act, as amended, on said applications, at which hearings the New York Central and Big Four introduced material, relevant and competent evidence in proof of the facts that the acquisitions of control under leases in the respective forms attached to said applications were in the public interest and were for such considerations and on such terms and conditions as were just and reasonable in the premises; and that the petitioner herein intervened in said proceedings before the Commission, appeared at said hearings and was heard in opposition to said applications.

[fol. 250] 9. That in the proceedings had on said applications certain railroad companies, to wit, Federal Valley Railroad Company, hereinafter called the Federal Valley; Boyne City, Gaylord & Alpena Railroad Company, hereinafter called the Alpena; Ulster & Delaware Railroad Company, hereinafter called the Ulster; Chicago, Attica & Southern Railroad Company, hereinafter called the Attica; Fonda, Johnstown & Gloversville, hereinafter called the Fonda; Owasco River Railway, hereinafter called the Owasco; Southern New York Railway, Incorporated, here-

inafter called the Southern; all hereinafter occasionally referred to collectively as the short lines, intervened and introduced testimony.

10. That thereafter the Commission made and filed a report dated January 14, 1929, and reported in 150 I. C. C. 278, containing the following findings of fact and conclusions upon the aforesaid applications:

"Upon the facts presented, we find that the proposed acquisition by the Big Four of control of the railroad properties of the Cincinnati Northern and the Terra Haute, and the proposed acquisition by the New York Central of control of the railroad system of the Big Four, including all right, title, and interest of the Big Four in the properties of the Cincinnati Northern, the Terre Haute, the Peoria & Eastern Railway Company, and the Kankakee & Seneca Railroad Company, the railroad system of the Michigan Central, and the railroad properties of the Kalamazoo, under, and for the considerations and upon the terms and conditions set forth in the proposed leases, which considerations and terms and conditions we find to be just and reasonable in the premises, will be in the public interest.
[fol. 251] "We further find that preservation of the lines of the Alpena, the lines of the Attica, the line of the Federal Valley, the steam railroads of the Fonda, that part of the Owasco's properties hereinbefore referred to as the southern segment, and the lines of the Ulster, is required by public convenience and necessity and for the maintenance of an adequate transportation system, as conceived and provided for by the transportation act, and that they are shown to be complementary to and properly apportionable to the New York Central system.

"We therefore find that our authorization of the unification herein proposed should be upon the express condition that before said leases become effective, the New York Central shall offer to acquire the lines of the Alpena, the lines of the Attica, the line of the Federal Valley, the steam railroads of the Fonda, that part of the Owasco's properties hereinbefore referred to as the southern segment, and the lines of the Ulster, for considerations equal to the commercial value of the respective properties as determined by agreement between the parties, or by arbitration in the manner prescribed in said leases for valuation of minority

shares of stock of the lessors, and hereafter approved by us; and provided further, that the right to determine bona fide compliance with the foregoing condition is hereby expressly reserved in us; and further provided, that acceptance of and compliance with the conditions precedent herein prescribed shall not be interpreted as relieving the New York Central from the further operation of the law respecting consolidations or as excusing that carrier from further responsibility for the representation made on its behalf that on appropriate occasion for considering the inclusion of so-called short-line railroads, these matters will be approached by the New York Central in a spirit of cooperation looking to their solution with all due regard to the public interest.

"Accordingly, the entry of our order of authorization and approval herein will be deferred until compliance with said condition has been shown by proper proof of all pertinent facts relating to the communication of said offers to the short lines concerned, the course and details of negotiations had thereon, and final acceptance or rejection, as the case may be, of said offers by the respective short lines. For this purpose, the record herein will be held open for six months from the date hereof, and on receipt and consideration of such proof a final order will be entered."

[fol. 252] 11. That thereafter the New York Central filed with the Commission a supplemental petition on April 27, 1929 showing that it had with due diligence complied with the requirements of the Commission and prayed that the proceedings be closed and that the Commission by order grant the authorization and approval sought in the original applications.

12. That thereafter the Commission made and filed its report and order dated July 2nd, 1929 in which it found that the offers of the New York Central and the steps taken subsequent thereto were in bona fide compliance with the conditions prescribed in its previous report and provided for the entry of an order authorizing and approving the proposed acquisitions of control upon the following conditions:

"1. That opportunity be accorded to the Fonda within six months from the date hereof to designate an arbitrator and thereupon be entitled to arbitration in accordance with ap-

plicable provisions of the leases and to receive an offer from the New York Central for the purchase of its steam railroads in accordance with the award of the arbitrators.

2. That nothing herein shall be construed to relieve the Big Four or the New York Central from compliance with provisions of law applicable to any assumption of obligations and liabilities, etc., by virtue of execution of the proposed leases.

3. That no stock of the lessor companies shall be sold or otherwise disposed of by the Big Four or by the New York Central without authority from us first had and obtained.

4. That all conditions heretofore prescribed by us in this proceeding shall remain in full force and effect."

and that thereupon the Commission made and filed its formal order dated July 2nd, 1929 approving and authorizing [fol. 253] the acquisition of control by leases of the railroads described in the aforesaid applications, which order is as follows:

"Hearings and investigation of the matters and things involved in this proceeding having been had, and the commission having, on January 14, 1929, and on the date aforesaid, made and filed reports containing its findings of fact and conclusions thereon, which reports are hereby referred to and made a part hereof:

It is ordered, That the acquisition by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company of control of the railroad properties of the Cincinnati Northern Railroad Company and of the Evansville, Indianapolis & Terre Haute Railway Company, and the acquisition by the New York Central Railroad Company of control of the railroad system of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, including all right, title, and interest of said company in the properties of the Cincinnati Northern Railroad Company, the Evansville, Indianapolis & Terre Haute Railway Company, the Peoria & Eastern Railway Company, and the Kankakee & Seneca Railroad Company, of the railroad system of the Michigan Central Railroad Company, and of the railroad properties of the Chicago, Kalamazoo & Saginaw Railway Company, in accordance with the terms of the proposed leases set forth in the

applications, and upon the conditions prescribed in said reports, be, and the same are hereby, approved and authorized.

It is ordered, That, within 10 days after the execution thereof, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the New York Central Railroad Company, or either of them acting for both, shall file with this Commission duly verified copies of said leases in the form in which executed.

It is further ordered, That the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the New York Central Railroad Company shall report to this commission as required by valuation order No. 24, effective May 15, 1928.

And it is further ordered, That this order shall become effective 30 days from its date, provided within that time the New York Central Railroad Company shall have filed herein formal acceptance of the conditions prescribed in the orders in this proceeding.

By the Commission.

George B. McGinty, Secretary."

[fol. 254] 13. That the said order of July 2nd, 1929, and the findings of the Commission contained in its report of January 14th, 1929, and of July 2nd, 1929, upon which it was based were supported by competent and substantial evidence.

14. That the New York Central at the time of said report of January 14th, 1929 owned directly or through a subsidiary 99.19% of the stock of the Michigan Central, 100% of the stock of the Chicago, Kalamazoo & Saginaw Railway Company and of the Evansville, Indianapolis and Terre Haute Railway Company, 97.72% of the stock of the Cincinnati Northern Railroad Company, and 91.31% of the common stock and 84.69% of the preferred stock of the Big Four. The increase of its holding in the common stock of the Big Four from 64% in 1922 had been with the approval of the Commission (72 I. C. C. 96). The New York Central and its subsidiaries have common executives. Thirteen of the fifteen directors of the Big Four and Michigan Central are also directors of the New York Central.

15. That thereafter on the 18th day of July, 1929, the New York Central filed with the Commission formal ac-

ceptance of the conditions prescribed in the orders of the Commission upon said applications.

16. That thereafter and or or about the 24th day of July, 1929, the New York Central and the Big Four made separate applications to the Commission, recorded under Finance Docket No. 7744, pursuant to Section 20(a) of the [fol. 255] Interstate Commerce Act, as amended, for authority to assume obligation or liability in connection with said leases in respect of securities of their respective lessor companies.

17. That thereafter and or or about the 18th day of November, 1929, the Commission held a hearing, after notice duly given as required by the provision of the Interstate Commerce Act, as amended, on said applications, at which hearing the New York Central and the Big Four introduced material, relevant and competent evidence in support of said applications showing that such assumption was for a lawful object within the corporate purposes of the applicants and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the respective applicants of service to the public as common carriers, and which will not impair their ability to perform that service and is reasonably necessary and appropriate for such purpose; and that the petitioner herein intervened in said proceedings before the Commission, appeared at said hearing and was heard in opposition to said applications.

18. That thereafter the Commission made and filed its report and order, dated the 2nd day of December, 1929, authorizing the New York Central and the Big Four, as lessees, to assume obligation and liability in respect of the securities of the lessor companies, in which report it made the follow findings:

[fol. 256] "We find that the proposed assumption of obligations and liabilities, as lessee, (1) by the New York Central in respect of the securities shown in appendix A to this report, (2) by the Big Four in respect of the securities shown in appendix B to this report, and (3) by either or both of those companies, as may be appropriate, in respect of the securities of other companies involved in the leases, which may be issued by those companies, on or be-

fore the effective date of the proposed leases, pursuant to authority heretofore granted by us but not yet exercised, as aforesaid (a) is for a lawful object within their respective corporate purposes, and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by them of service to the public as common carriers, and which will not impair their ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

An appropriate order will be entered."

That the order of the Commission of December 2nd, 1929 so entered upon said applications is as follows:

"A hearing upon the application in Finance Docket No. 7744, and investigation of the matters and things involved in these proceedings having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, pursuant to the terms of proposed leases set forth in its application and the report aforesaid, the New York Central Railroad Company be, and it is hereby, authorized to assume obligation and liability, as lessee, in respect of the securities shown in appendix A to the report herein, and in respect of the securities of other companies involved in said leases which may be issued by said companies, on or before the effective date of the proposed leases, pursuant to authority heretofore granted by this commission but not yet exercised.

It is further ordered, That, pursuant to the terms of the proposed leases set forth in its application and the report aforesaid, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company be, and it is hereby, authorized to assume obligation and liability, as lessee, in respect of the securities shown in appendix B to the report herein, and in respect of the securities of other companies involved in said leases which may be issued by said companies, on or before the [fol. 257] effective date of the proposed leases, pursuant to authority heretofore granted by this commission, but not yet exercised.

It is further ordered, That, except as herein authorized, obligation and liability in respect of said securities shall

not be assumed by the applicants, or either of them, unless and until so ordered by this commission.

It is further ordered, That the applicants, or either one of them acting for both, shall report concerning the matters herein involved in conformity with the commission's order dated February 19, 1927, respecting applications filed under section 20a of the interstate commerce act; said report or reports to include any securities, in respect of which the applicants assume obligation and liability, that may be issued between the date of this order and the effective date of the proposed leases.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said securities, or dividends or interest thereon, on the part of the United States.

And it is further ordered, That this order shall become effective 30 days from its date.

By the Commission, division 4.

George B. McGinty, Secretary."

19. That the said order of December 2nd, 1929, and the findings of the Commission in its report of even date upon which the order was based were supported by competent and substantial evidence.

20. That the Big Four and the New York Central pursuant to the approvals and authorizations contained in the above mentioned orders of the Commission proceeded to enter into the leases therein authorized and approved, and the said leases became effective as of February 1, 1930 and have been in force on and subsequent to that date.

[fol. 258] Conclusions of Law

1. That the findings of the Commission upon the respective applications of the Big Four and New York Central, recorded in Finance Dockets Nos. 5688 and 5690, that the acquisitions of control of the railroads and railroad systems referred to in said applications for the considerations and upon the terms and conditions set forth in the proposed leases, forms of which were attached to the applications, were in the public interest and that the considerations and terms and conditions were just and reasonable in the prem-

ises, were supported by competent and substantial evidence; and that the orders entered by the Commission upon such findings authorizing and approving the acquisition of control of said railroads and railroad systems under the respective leases as prayed for in said applications were within the jurisdiction of the Commission and valid in all respects.

2. That upon the finding by the Commission that the acquisition of control by the Big Four and New York Central respectively of the railroads and railroad systems referred to in the respective applications recorded in said Finance Dockets Nos. 5688 and 5890 for the considerations and upon the terms and conditions set forth in the forms of leases attached to said applications, was in the public interest and that the considerations and terms and conditions [fol. 259] were just and reasonable in the premises, and, under the orders entered by the Commission upon such findings authorizing and approving such leases, the carriers affected by said orders were, pursuant to the provisions of Paragraph 8 of Section 5 of the Interstate Commerce Act, relieved from the operation of the "anti trust laws" as designated in Section 1 of the act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914 and of all other restraints or prohibitions by law, State or Federal, insofar as may be necessary to enable said carriers to do anything authorized or required by said orders under and pursuant to Paragraph 2 of Section 5 of said Act.

3. That Paragraph 2 and Paragraph 8 of Section 5 of the Interstate Commerce Act are constitutional and within the power of Congress to enact, and the powers therein conferred upon the Commission are lawfully conferred upon it.

4. That the findings of the Commission upon the respective applications of the Big Four and the New York Central, recorded in Finance Docket No. 7744, that the assumption of obligation or liability by the Big Four and New York Central in respect of the securities of their respective lessor companies is (a) for some lawful object within the corporate purposes of said respective carriers and compatible with the public interest, which is necessary or appropriate [fol. 260] for or consistent with the proper performance by

said respective carriers of service to the public as common carriers and which will not impair their ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose, were supported by competent and substantial evidence; and that the orders entered by the Commission upon such findings authorizing and approving the assumption of obligation or liability by the Big Four and New York Central in respect of the securities of their respective lessor companies, were within the jurisdiction of the Commission and valid in all respects; and that the jurisdiction of the Commission in respect of such assumption of obligation or liability was exclusive and plenary, and the said carriers upon the entry of said orders by the Commission were authorized to assume obligation or liability in respect of the securities of their respective lessor companies without securing approval otherwise than as specified in said section.

5. That the leasing by the Big Four of the railroads of The Cincinnati Northern Railroad Company and of Evansville, Indianapolis and Terre Haute Railway Company for the considerations and upon the terms and conditions set forth in the proposed leases thereof was within the corporate powers of the lessor and lessee companies, and the leasing by the New York Central of the railroad systems of the Big Four (including the Cincinnati Northern Railroad and the Evansville, Indianapolis and Terre Haute [fol. 261] Railway), of the Michigan Central and of the Chicago, Kalamazoo and Saginaw Railway Company for the considerations and upon the terms and conditions set forth in the proposed leases thereof was within the corporate powers of the lessor and lessee companies; and that such leasings upon their authorization and approval by the Commission under Paragraph 2 of Section 5 of the Interstate Commerce Act are legal and valid.

6. That the leases having been found in the public interest, and, the consideration and terms and conditions of said leases having been found just and reasonable in the premises by the Commission pursuant to the provisions of Paragraph 2 of Section 5 of the Interstate Commerce Act, the same are not subject to attack in a suit brought by a minority stockholder of either the lessor or lessee companies on the ground of an alleged conflict with the restrictions

contained in Section 8809 of the General Code of Ohio or with other limitations of state law alleged in the petition herein.

7. That the petitioner has shown no cause of action against the defendants and is not entitled to the relief prayed for in the petition or to any other relief at law or in equity in the premises.

8. That the petition filed herein should be dismissed upon the merits with costs to the defendants.

Dated New York, N. Y., June 23, 1931.

John M. Woolsey, U. S. District Judge. Alfred C. Coxe, U. S. District Judge.

[fol. 262] In United States District Court, Southern District of New York

Present: Hon. Julian W. Mack, Circuit Judge; Hon. Alfred C. Coxe, Hon. John M. Woolsey, District Judges.

In Equity. 50-133

New York Central Securities Corporation, Petitioner

against

United States of America, Interstate Commerce Commission, the New York Central Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and the Michigan Central Railroad Company, Defendants

Decree Dismissing Petition—Filed June 24, 1931

The petitioner herein having moved that this cause be set down for final hearing before a Court constituted and convened as provided by Section 47, Title 28, United States Code, and the Honorable John M. Woolsey, District Judge, having set down this cause for final hearing before a Court of three judges constituted and convened as provided in said Section of the United States Code, and having called to his assistance the Honorable Julian W. Mack,

Circuit Judge, and the Honorable Alfred C. Coxe, District Judge, and the said cause having come on for final hearing before the said Court on the 7th day of March, 1931, upon the issues raised by the petition and supplemental petition and by the answers and supplemental answers filed herein, [fol. 263] and the parties having appeared herein by their solicitors, and the proofs of the parties having been duly submitted and heard, and the Court having rendered its opinion herein by the Honorable Julian W. Mack, Circuit Judge, and having made and filed findings of fact and conclusions of law;

Now, on the pleadings, proceedings and proofs herein, including the opinion of the Court filed herein, and due deliberation having been had, it is unanimously

Ordered, adjudged, and decreed that the motion for injunction be denied and that the petition herein be, and the same hereby is, in all respects dismissed upon the merits; and it is unanimously

Further ordered, adjudged, and decreed that the defendants recover of the petitioner their costs and disbursements, to be taxed.

John M. Woolsey U. S. District Judge. Alfred C. Coxe, U. S. District Judge.

Affidavit of Service annexed

[File endorsement omitted.]

[fol. 264] [File endorsement omitted]

Service admitted.

June 27, 1931.

This motion is in all respects denied.

Woolsey, U. S. D. J. Alfred C. Coxe, U. S. D. J.

[fol. 265] In United States District Court

[Title omitted]

Notice

Sirs: Please take notice that upon the annexed petition of New York Central Securities Corporation, the above-named

petitioner, duly verified the 19th day of June, 1931, and upon all the other pleadings, papers and proceedings herein, the undersigned will move at a Stated Term of this Court, for the hearing of motions, appointed to be held in the Old Post-Office Building, in the Borough of Manhattan, New York City, on the 26th day of June, 1931, at 10:30 A. M., or as soon thereafter as counsel can be heard, that a rehearing [fol. 266] be granted herein as prayed for in said petition; and for such other and further relief in the premises as may be just and equitable.

Dated New York, June 19th, 1931.

Yours, etc., House, Grossman & Vorhaus, Attorneys for Petitioner. Office & Post Office address: No. 521 Fifth Avenue, Borough of Manhattan, New York, N. Y.

To Daniel W. Knowlton, Esq., Solicitor for the Defendant Interstate Commerce Commission, Washington, D. C. Elmer B. Collins, Esq., Solicitor for the Defendant United States of America, Washington, D. C. Jacob Aronson, Esq., Solicitor for the Defendant Railroad Companies, No. 466 Lexington Avenue, New York, N. Y.

[fol. 267] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPLICATION BY PETITIONER FOR A REHEARING WITH ARGUMENT—Filed June 26, 1931

The petitioner, The New York Central Securities Corporation, respectfully presents this, its application for a rehearing herein, upon the ground that the Court erred in finding and holding generally that (Opinion, p. 17) "The temporary injunction must be denied and the petition to set aside and annul the orders of the Interstate Commerce Commission must be dismissed at petitioner's costs"; also [fol. 268] in failing and refusing to grant to petitioner the relief prayed for in paragraph (b) of the prayer of its petition, and the relief prayed for in its supplemental petition; and upon the further and particular grounds following, namely:

First. The Court erred in failing to find, in accordance with petitioner's contention before the Commission, as charged in paragraph 9 of the petition herein, that the proposed leases are "oppressive to minority stockholders of the Big Four and Michigan Central, and violative of the rights of said intervener," petitioner herein; also, as further charged in paragraph 16 of the petition, that "the terms of the proposed leases are peculiarly oppressive to the lessors' minority stockholders," and the rental-dividends of $50 per share per annum to the Michigan Central's minority stockholders is a grossly inadequate return, being "a deprivation forced upon said minority stockholders and a corresponding unfair and unlawful advantage exacted by the majority stockholders," which is "in violation of the trust relationship occupied by the latter toward the former"'; and that, as charged in paragraph 18 of the petition, the dividend rental of $10 per share per annum is likewise "inadequate and unfair to the minority stockholders of the Big Four."

In dealing with these averments (which charge, in substance and effect, that the terms of the leases are arbitrary and confiscatory—there is no technical necessity for those very words—as well as in breach of trust) the Court's opinion, as petitioner now respectfully submits, is reasoned upon a "shifting ground" (Ignoratio Elenchi), in that it treats the issue of the lessee's breach of trust as if it were included in or dependent upon whether the Commission's [fol. 269] order (approving and authorizing the New York Central's acquisition of control by lease of the Michigan Central and Big Four upon the terms and conditions therein named) is or is not arbitrary or confiscatory in the light of the "public interest".

Of course, the public interest does not require that these properties be leased at all. Neither Congress nor the Commission has commanded it. The New York Central is under no compulsion of law or equity to enter into the leases. As a fiduciary, the lessee is not even permitted, on familiar principles of law and equity, to enter into them at all except upon the very best terms obtainable from any other lessee, nor for any less than the utmost it would itself be willing to pay rather than that another should become the lessee.

Perhaps such terms would exceed what the public interest would permit. If so, the leases could not be voluntarily consummated. Both conditions must be satisfied, so long as such transactions are on a voluntary basis and are not compelled by statute—with a scrupulous discharge of the fiduciary duty as well as a scrupulous preservation of the public interest. Not only must the terms and conditions lawfully prescribed by the Commission be observed, but also the rights in law and equity of the cestui que trust.

No doubt the public interest is relatively the more important; but it can never be made exclusive. At any rate, it need not now be inquired whether Congress could make the public interest the sole criterion, if compulsory acquisition of control by lease were made the subject of Federal legislation. The order authorizing and approving these leases does not necessitate their being entered into.

[fol. 270] On the issue of "public interest," inadequacy of rental is irrelevant, unless it be gross enough to be "arbitrary and confiscatory." On the issue of "breach of trust" the slightest inadequacy, the fixing of any rate of rental less than the maximum obtainable, is not only relevant, but is sufficient in equity to set aside the transaction. (See quotation in petitioner's brief, at page 43, from Geddes v. Anaconda Copper Mining Co., 254 U. S. 590, 599. See also quotation in pefitioner's brief, at page 38, from opinion of C. C. A., 6th Cir., in Hyams v. Calumet & Hecla Mining Co., 221 Fed. 529-537.)

Now the first and last sentences in part "Third" of the Court's opinion, pages 10 and 11, are as follows:

"Plaintiff urges that the dividend rentals are, as a matter of law, inadequate and unreasonable. No direct claim of confiscation is alleged. In view of the fact that the lessee is the majority interest in the lessor corporations, the transaction compels careful scrutiny. (150 I. C. C. 314; 105 I. C. C. 425; cf. Farmers' L. & T. Co. v. N. Y. & H. Co., 150 N. Y. 410; Boyd v. N. Y. & H. R. Ry. 220 Fed. 174, 181.) The situation was adequately presented to the commission by the intervention of the present plaintiffs • • • The public interest is the paramount consideration, and although the interests of stockholders must not be ignored (see Cleveland, C. C. & St. Louis Ry. v. Jackson, 22 F. [2nd] 509; Nickel Plate Unification, 105 I. C. C.

425), the plaintiff has in our judgment failed to prove its claim of gross inadequacy."

The Sixth Circuit Court of Appeals decision in the Jackson case above cited by this Court, dealing in advance of the Commission's order with a part of the very same sub-[fol. 271] ject matter (Big Four lease), which this statutory court in its review of said order is now considering herein, is itself authority for the point of distinction which we seek to make. As said by the Court in the Jackson case, 22 Fed. (2d) 509, at pages 510-511:

"We think it is the duty of the Commission to protect both the public and private interests, and although it finds that the acquisition will be in the public interest, it may not approve the lease until it further finds that the consideration, terms and conditions thereof are just and reasonable—just to the lessor, the lessee, and necessarily to the stockholders of each."

Equity would not intervene to forestall an order of the Commission, which under the statute can authorize no terms of lease that are not "just and reasonable"; but conversely (as held in Chicago Junction Case, 264 U. S. 258, 267), a statutory court will interfere to prevent injury from an order of the Commission, the effect of which when carried out, is to deny to the parties in interest "equality of treatment."

Now, what are the admitted facts in evidence before the Commission? (It is to be remembered that the burden of proving uberrima fides is upon the party owing that class and measure of duty. See quotation in petitioner's brief, at page 43, from Pennsylvania Canal Co. v. Brown, 235 Fed. Rep. 669, decided by the C. C. A., 3rd Cir.) Vice-President Harris testified that he thought it no part of his "obligation or duty in the quasi-fiduciary capacity of the New York Central, as the majority stockholder in this transaction, to make any inquiry in regard to what might be obtained for the lease of this property at the hands of other possible [fol. 272] lessees" (Rec., pp. 445, 446). President Crowley testified likewise (Rec., p. 568). He admits that possibly "a much better bargain for the minority stockholders might have been obtained" (Rec., p. 569). He admits that for

both leases the New York Central would not let these properties go elsewhere at double the rental stipulated in these proposed leases (Rec., pp. 565, 568). Their testimony verbatim is as follows:

Mr. A. H. Harris, vice-president and chairman of the Finance Committee, testified as follows:

By Mr. Henry:

"Q. One thing that I omitted when you were looking up some of the statistics, that I meant to ask, and I will ask it now. Did you or did you not think it any part of your obligation or duty in the quasi-fiduciary capacity of the New York Central as the majority stockholder in this transaction to make any inquiry in regard to what might be obtained for the lease of this property at the hands of other possible lessees?

A. I thought I answered that, Judge. No, we did not.

Q. You did answer it by saying that in so far as you did not make any such inquiry; but I did not ask you before as to whether you thought that was an inquiry which it was not a part of your duties or business to make.

A. No; under the circumstances of this case, I did not think so.

Q. You all the while assumed that no such disposal of the property would in any circumstances be made, whatever the offer might be?

A. Yes. I had no expectation that the New York Central and the Michigan Central would desire to separate and that the Michigan Central should go to some outside system" (Rec., pp. 445-446).

[fol. 273] President Patrick E. Crowley, examined by Mr. Elihu Root, Jr., counsel for the Big Four Stockholders' Committee, testified:

"Q. Mr. Crowley, did you try to find out whether there was any other bidder than the New York Central which might be willing to give more than $10 a share on this (Big Four) common stock to get a lease of the railroad?

A. I did not.

Q. But if you were selling a house and lot for a beneficiary you would try to find out whether the purchaser in

view might have his offer capped by someone else? It would be a normal process, would it not?

A. I do not know, as I have never sold a house and lot.

Q. Did that idea occur to you?

A. It did not.

Q. Mr. Crowley, the Central owns a large amount of Big Four common stock. Do you know what the Central would take for that stock per share?

A. I do not.

Q. Would it let it go at a rental of $10 a share?

A. I do not know.

Q. Don't you know that it would not?

A. I imagine it would not.

Q. Would it let it go?

A. I would recommend against it.

Q. Suppose you had an offer of $15 a share, an offer from somebody else to lease the Big Four Railroad at $15 a share: Would you let your stock go for that?

A. I do not know, but I would not recommend it.

Q. Suppose you had an offer of $20 a share; suppose the Louisville & Nashville or Dillon & Reed or somebody offered you a rental of $20: Would you let your Central holdings go in the Big Four?

A. I would not recommend it.

Q. Then you made a bargain for these small stockholders as to their stock which you would not have taken, or the New York Central would not have taken, on its stock?

[fol. 274] A. The New York Central did not want to dispose of its stock. It is a part of our system.

Q. It has a value to you, a peculiar value?

A. It has; and, Mr. Root, in arriving—if I may answer the question in a little more detail, sir—in arriving at the rental named in the lease it appeared to be fair considering the past, the present and the future of the Big Four.

Q. But you just said that the Big Four common stock has to the Central a peculiar value which would prevent your letting it go even had a higher rental — offered.

A. Yes, sir.

Q. That peculiar value to the Central was one of the elements, was it not, which you might have counted a fairer bargain on as a representative of the Big Four common stockholders?

A. Yes'' (Rec., pp. 564-566).

By Mr. Henry:

"Q. You have given certain answers as to the willingness of the New York Central to part with its own holdings in the stock of the Big Four on the same basis of lease and rental as the minority stockholders are given under the terms of the proposed Big Four lease. I will ask you if, other things being equal and in the same proportion, your answers with regard to the holdings of the New York Central in the stock of the Michigan Central, being subject to being parted with on like terms, would be the same?

A. Yes, sir.

Q. I believe you said that you did not seek to determine whether or not there was any other party or company that would be willing to take over the Big Four on terms more liberal to the minority stockholders than this lease provides. Is the same true with regard to the Michigan Central?

A. Yes.

Q. Have you ever given consideration to the question as to whether or not there is any other railroad company that [fol. 275] might be interested in the Michigan Central property if it were available for lease to such company?

A. I have not.

Q. Considering it now, would you think that there is any such other company that, if it were open to such company to obtain a lease, would be interested to do so?

A. There might be.

Q. Would you consider from what you know of the relations of railroad companies and their circumstances—would you expect, for example, that the Detroit, Toledo & Ironton might possibly be interested in the Michigan Central property?

A. I do not know, Judge.

Q. Do you know, giving the subject consideration now, whether or not there is any likelihood or probability that the Lackawanna would be interested in the Michigan Central?

A. It might be.

Q. Do you know whether there is any other possibility that any of the western roads having eastern termini in Chicago might be interested in the Michigan Central?

A. I do not know; they might be.

Q. Is it not altogether probable that by shopping this lease around on the terms on which the New York Central Railroad Company has shown its willingness to take the lease, a much better bargain for the minority stockholders might have been obtained?

A. It is possible that some other road might pay more" (Rec., pp. 568-569).

What more could be required to show (even if petitioner held the burden of showing) that this volunteer lessee took these leases without fulfilling its fiduciary duty to the lessors' minority stockholders?

[fol. 276] Mason v. Pewabic Mining Co., 133 U. S. 50, 59;

Hoyt v. Latham, 143 U. S. 553;

So. Pac. Co. v. Bogert, 250 U. S. 483, 491-492;

C. M. & St. P. Ry. v. Des Moines & C. Ry., 254 U. S. 196.

Second. The Court erred in holding (Opinion, part "Fourth," pp. 14 and 15) that petitioner cannot here be heard to invoke General Code, Ohio, Section 8807 to Section 8809, in proof of the ultra vires character of these railroad leases, which cover property in that State, and in which the stipulated annual rental is less than the previous year's net earnings as prescribed by said statutes, and that

"* * * the attack based upon the State law limitation of the corporate power has no proper place in a suit to annul the order. Pittsburgh & W. Va. Ry. v. United States, 281 U. S. 479, 488, and cf. Cleveland etc. Ry. v. United States, 275 U. S. 404. The controversy as such is between the corporation and the minority stockholders.

The second objection, however, is based on the statutory power of the Commission. It can no longer be doubted that under its constitutional power to regulate interstate commerce, Congress may disregard prohibitions affecting such commerce, imposed by the states. New York v. United States, 257 U. S. 591; Colorado v. United States, 271 U. S. 153. It may also, under the same constitutional grant of power, confer upon corporations created under State statutes, powers not conferred by state charter. New York v. United States, supra; R. R. Comm. v. C. B. & Q. R. R., 257

U. S. 563. See California v. Central Pacific Ry., 127 U. S. 1; Southern Pacific Ry. v. United States, 183 U. S. 519. In [fol. 277] the instant case, moreover, the power to lease is granted by the Ohio statute; the statute merely places a restraint upon the exercise of the power."

The petitioner's right as a minority stockholder of a lessor railroad company, to enforce here the protection against an otherwise unlimited power to make and take such a lease, grows out of the unique relation of such stockholder as a direct third party to these leases, and to the fact that such leases (and the Commission's orders permitting them), directly affect petitioner's interest as an investor: so that the limits of this Court's jurisdiction are not defined by the rule of the Pittsburgh case, but rather by the principles of the Jackson case and of the Chicago Junction case, cited supra.

And the Court further erred in holding (Opinion, part "Fourth," pp. 15-17) that such statute does not operate as a limitation of the corporate power to lease conferred therein, and that, whether so or not, congressional legislation has occupied the field and superseded this Ohio statute. The opinion recites:

"Though in the original statute (70 Ohio Laws, 129, § 24) the restraint was in the form of a proviso on the power to lease, the code now in force deals with the minimum rental in a separate section. In our judgment, the power to lease is separable from the rental to be paid. Nor has the State of Ohio asserted any claim of ultra vires on its own behalf (see Cleveland, etc., Ry. v. United States, 275 U. S. 405, 414), although it was apparently notified of the pendency of the order as provided in § 20 a. We consider the corporate power unaffected by the limitation thereon.

[fol. 278] Regardless, however, of whether or not the statutory provision as to the rentals in a lease is in effect as well as in form merely a limitation on the granted power to lease, Congress has exercised its control in the field of railroad securities. See Colorado v. United States, 271 U. S. 153, 165; R. R. Comm. v. So. Pac. Ry., 264 U. S. 331. The authority to approve acquisition of control by lease is conferred upon the Commission by § 5 (2); the 'exclusive jurisdiction' to authorize issuance of securities and the assump-

tion of security obligations is conferred by § 20 a. The limitation as to 'corporate *purposes,*' as evidenced by the legislative history of the section, is not a limitation based upon the charter *powers* of the corporation. The statute manifestly was meant to draw within the federal control the complete regulation of the railroad securities, unhampered by state action or restriction. When Congress has entered upon a field directly related to interstate commerce, restrictions imposed by the states that directly affect the federal regulation are of no further validity."

As construed by the Ohio court of last resort, the codification of the statutes is presumed not to alter their original meaning and application. And the courts have construed the requirements of these sections of the Ohio statutes as limiting the corporate power to lease, etc., conferred thereby. This is expressly held of the dissection of a section of the previously existing statutes and making several sections thereof in the process of codification.

State ex rel., &c., v. Bushnell et al., &c., 95 Ohio St. 203, Syl. 2.

And the courts have construed these sections of the General [fol. 279] Code of Ohio (8809 and those preceding) as embodying both the grant and the limitations of the corporate power of railroad companies to enter into leases or other agreements between themselves in respect to their lines of road.

Mannington v. Hocking Val. Ry. Co., 183 Fed. 133, 150-151;

Central Trust Co. v. Wheeling & Lake Erie R. R. Co., 211 Fed. 515, 525-526, and cases cited;

State ex rel. Atty. Gen. v. Cleve. & Pittsburgh R. R. Co., 13 Ohio C. C. (N. S.) 145;

State v. Vanderbilt, 37 Ohio St. 590.

The limitations and the grant are inseparable. Are they superseded or nullified by the Transportation Law?

Subdivision (7) of Section 20-a provides only that

"The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in

accordance with the provisions of this section without securing approval other than as specified herein."

This evidently means not that corporate power is supplied by it to support every order made by the Commission under this section, but only that no such application as must be made to the Commission need be made elsewhere. The Transportation Law does not purport to supply a corporation code for the internal management of railroads and the clothing them with corporate power to enter into leases and it supersedes State laws only in those respects where it [fol. 280] is expressly so declared (as at the close of subdivision [6], paragraph [c] of Sec. 5), or where there is a direct conflict. The doctrine of general occupation of the field breaks down here when pressed too far, for State corporation laws have still wide application to railroads. Even the sweeping clause just cited—which provides that a railroad consolidation may be affected pursuant to the provisions of subdivision (6), "the law of any State or the decision or order of any State authority to the contrary notwithstanding"—did not prevent the Supreme Court from deciding in Snyder v. N. Y. C. & St. L. R. Co., 278 U. S. 578; 1180 S. 72, that the Nickel Plate consolidation was properly effected under State statutes exclusively, despite the previously enacted provisions of the Transportation Law and the previous action of the Interstate Commerce Commission in the taking of its first long step thereunder by adopting its tentative nation-wide plan of railroad consolidation; because (as the Court strangely held) this field had not then come so far into Federal occupation as to supersede the operation of the State corporation laws on that subject.

Of course, the clause above quoted has no application to railroad leases. And it would be forever supererogatory even as to railroad consolidations if subdivision (8) of the same section (which, having a different object, applies to both) were construed, in disregard of the ejusdem generis rule, to include other than anti-monopoly legislation, and laws of that kind, in its exemption from "restraints or prohibitions" of State or Federal law. Thus, when Congress intended ultimately, with respect to railroad consolidations, to dispense with and supersede all State corporation laws, it so expressly declared in Section 5, (6), (c). When,

however, in respect to acquisitions of control by lease, etc., [fol. 281] as well as to consolidations, Congress—by the provisions of Section 5, (8)—intended that such transactions, if approved by the Commission, should be "relieved from the operation of" all such kinds of "restraints and prohibitions," whether "State or Federal," as are imposed by the "anti-trust laws," it clearly did not mean—or it would have expressly so said, as in Section 5, (6), (c)—that the State codes of corporation laws, defining the grants (and annexed limitations) of the power of railroad companies to enter into such transactions, are superseded, the differences of phraseology in these two provisions of the Transportation Law should (petitioner respectfully submits) have been given effect by the Court as significant of different purposes intended by Congress to be attained. Congress encourages consolidations under the permanent nation-wide plan by removing all obstacles, including defect, limitation, or express negation of corporate power. Not so of leases.

In Ohio, therefore, General Code, Section 8809, should still govern these leases, as a limitation upon the grant of corporate power to enter into them, and as the criterion of the "lawfulness of the object" involved in the assumption by the New York Central of the obligation to pay the rental dividends to the lessors' minority stockholders.

Third. The several points made in the original brief for petitioners, and disallowed by the Court, but not herein discussed, are not, therefore, abandoned; but such rulings are respectfully cited as errors and grounds for this application.

The petitioner respectfully submits that on the record, the law and the decisions of the highest courts applicable thereto, as set forth herein, the orders of the Interstate [fol. 282] Commerce Commission involved in this proceeding were and are contrary to law, unwarranted, arbitrary and confiscatory, and should be annulled and set aside by this Court as illegal and void.

Wherefore petitioner prays that a rehearing be granted and for the relief prayed in its petition and supplemental petition.

The New York Central Securities Corporation, by Clarence H. Venner, President. House, Grossman & Vorhaus, Attorneys for Petitioner. Office & P. O. address; 521 Fifth Avenue, New York, N. Y. Frederick A. Henry, Joseph Fischer, of Counsel.

[fol. 283] *Duly sworn to by Clarence H. Venner. Jurat omitted in printing.*

[fol. 284] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL BY THE NEW YORK CENTRAL SECURITIES CORPORATION—Filed July 23, 1931

The New York Central Securities Corporation, Petitioner, feeling itself aggrieved by the final order or decree of the District Court, entered June 24th, 1931, prays an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final decree or order erroneous are set forth in the Assignment of Errors on file, to which reference is hereby made. Petitioner prays that a transcript of the record, proceedings and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

House, Grossman & Vorhaus, House, Grossman & Vorhaus, Solicitors for Petitioner. Office & P. O. Address: 521 Fifth Avenue, New York City.

[File endorsement omitted.]

[fol. 285] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 23, 1931

The New York Central Securities Corporation, petitioner, by its Counsel, now comes, and in connection with

its petition for appeal files the following Assignment of Errors, on which it will rely on its appeal to the Supreme Court of the United States from the final order or decree of the District Court, entered June 24th, 1931.

The District Court erred:

1. In holding that at the hearings held by The Interstate Commerce Commission upon the application of The New York Central Railroad Company (F. D. 5690), for authority to acquire control, under lease, of the railroad systems of The Cleveland, Cincinnati, Chicago and St. Louis Rail-[fol. 286] way Company (Big Four), of The Michigan Central Railroad Company (Michigan Central) and of The Chicago, Kalamazoo & Saginaw Railway Company, The New York Central Railroad Company introduced material, relevant and competent evidence in proof of the fact that the acquisitions of control of the Big Four and Michigan Central under leases in the forms attached to said application, were in the "public interest" and for such considerations and on such terms and conditions as were just and reasonable in the premises.

2. In holding that the order of The Interstate Commerce Commission, dated July 2nd, 1929, in said case (F. D. 5690), authorizing and approving said acquisitions of control, and the findings contained in its reports of January 14th, 1929 and of July 2nd, 1929, upon which the said order was based, were supported by competent and substantial evidence.

3. In holding that at the hearing held by the Commission upon the application of The New York Central Railroad Company, recorded under F. D. 7744, for authority to assume obligation or liability, in connection with said leases, in respect of the securities of the respective lessor companies, The New York Central Railroad Company introduced material, relevant and competent evidence in support of said application.

4. In holding that the order of December 2nd, 1929, of The Interstate Commerce Commission in said matter (F. D. 7744), authorizing The New York Central Railroad Company, as Lessee, to assume obligation and liability, in re-[fol. 287] spect of the securities of the Lessor Company, and the findings of the Commission in its report of even

date, upon which the order was based, were supported by competent and substantial evidence.

5. In holding that the findings of the Interstate Commerce Commission upon the application of The New York Central Railroad Company (F. D. 5690) that for the acquisition of control of the Big Four and Michigan Central the considerations and terms and conditions set forth in the proposed leases were just and reasonable, were supported by competent and substantial evidence.

6. In holding that the orders, entered by the Interstate Commerce Commission, authorizing and approving the acquisition of control of the Big Four and Michigan Central, as prayed for in said application (F. D. 5690), were within the jurisdiction of the Commission and valid in all respects.

7. In holding that upon the findings by the Commission in the application recorded in F. D. 5690 and under the orders entered by the Commission upon such findings, authorizing and approving the leases of the Big Four and Michigan Central Railroads, the carriers affected by said orders were, pursuant to the provisions of paragraph 8 of Section 5 of the Interstate Commerce Act, relieved from the operation of the "anti-trust laws" and of all other restraints by law, state or federal, in so far as may be neces- [fol. 288] sary to enable said carriers to do anything authorized or required by said orders under and pursuant to paragraph 2 of section 5 of said Act.

8. In holding that paragraph 2 and paragraph 8 of section 5 of the Interstate Commerce Act are constitutional and within the power of Congress to enact, and the powers therein conferred upon the Commission and herein exercised were lawfully conferred upon it.

9. In holding that the order entered by the Interstate Commerce Commission (F. D. 7744), authorizing and approving the assumption of obligation or liability by The New York Central Railroad Company, in respect of the securities of its Lessor Companies, was within the jurisdiction of the Commission and valid in all respects; and that the jurisdiction of the Commission, in respect of such assumption of obligation or liability, was exclusive and plenary.

10. In holding that the leasing by the New York Central Railroad Company of the railroad systems of the Big Four and of the Michigan Central, for the considerations and upon the terms and conditions set forth in the proposed leases thereof, was within the corporate powers of the Lessor and Lessee Companies; and that such leases, upon the authorization and approval by the Commission under paragraph 2 of section 5 of the Interstate Commerce Act, are legal and valid.

11. In holding that the leases of the Big Four and Michi- [fol. 289] gan Central having been found in the "public interest" and the considerations and terms and conditions of said leases having been found just and reasonable in the premises by the Commission, pursuant to the provisions of paragraph 2 of section 5 of the Interstate Commerce Act, the same are not subject to attack in a suit brought by a minority stockholder of either the Lessor or Lessee Companies, on the ground of an alleged conflict with the restrictions contained in Section 88 of the General Code of Ohio, and or with other limitations of said law alleged in the petition herein.

12. In holding that after control has been acquired through stock ownership and interlocking directorates, the Commission has authority to approve leases on the basis of "public interest".

13. In holding that, in construing section 5 (6) and section 5 (2) of the Interstate Commerce Act, Congress laid down no test for consolidation other than ownership by one corporate entity.

14. In holding that the standard of judgment of what may be "in the public interest" provided by the Interstate Commerce Commission was not too vague to be applicable and enforceable herein.

15. In holding that the dividend rentals were adequate and reasonable.

16. In holding that an inquiry by the Court below as to whether dividend rentals were adequate and reasonable, [fol. 290] would involve a substitution of that Court's judgment for the judgment of the Interstate Commerce Commission.

17. In holding that the Commission did not abuse its discretion in authorizing the leases on the terms therein specified.

18. In holding that the finding of "public interest" was sufficiently supported by the evidence before the Commission.

19. In holding that the Commission had power to condition its authorization in F. D. 5690 upon the acquisition of the short lines for which the New York Central and Big Four had not applied and which they strenuously resisted.

20. In holding that the petitioner cannot assert the invalidity of such an order.

21. In holding that the Interstate Commerce Commission was empowered or entitled to disregard in the present case prohibitions against the action taken herein existing under the laws of the State of Ohio and/or other states.

22. In holding that the danger of subsequent action by bondholders was too remote to constitute petitioner a party in interest under the trust agreement, entered into by The New York Central Railroad Company, pledging stock it owned in the Michigan Central.

23. In holding that the equitable right of the lessors' minority stockholders, including this petitioner, to require [fol. 291] that the terms, conditions and considerations of these leases, if entered into at all, shall be nothing less than the best and most favorable in their behalf obtainable by the dominant party, was justly and reasonably subordinated and surrendered to the public interest by and in virtue of the Commission's permissive orders, thus depriving petitioner of its property without due process of law.

24. In holding that petitioner has shown no cause of action against defendants and is not entitled to any relief at law or in equity in the premises.

25. In holding that the petition filed herein should be dismissed upon the merits, with costs to the defendants.

26. In refusing to enjoin, set aside and annul as prayed for herein the orders of the Interstate Commerce Commission complained of by holding as aforesaid in each and all of the foregoing assignments of error herein.

27. In denying the petition for rehearing by a Court not constituted as required by the Act of October 22nd, 1913 in that only two (2) judges considered and acted upon the said petition for rehearing.

Wherefore Petitioner prays that the said order and decree dated June 24th, 1931, be set aside and that Petitioner [fol. 292] be granted relief as prayed for in its petitions herein.

House, Grossman & Vorhaus, House, Grossman & Vorhaus, Solicitors for Petitioner. Office & Post Office address: No. 521 Fifth Avenue, Borough of Manhattan, City of New York, N. Y.

[File endorsement omitted.]

[fol. 293] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 23, 1931

The Appellant in the abve entitled suit, having prayed for the allowance of an appeal in this cause, in the Supreme Court of the United States, from the decree made and entered in the above entitled suit by the District Court of the United States, for the Southern District of New York, on the 24th day of June, 1931, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the District Court of the United States, for the South-[fol. 294] ern District of New York, in this cause, as provided by law; and it is further

Ordered that the Clerk of the Court appealed from shall prepare and certify a transcript of the record, proceedings and decree in this cause, and transmit the same to the Supreme Court of the United States, so that he shall have

the same in said Court, within thirty (30) days of this date; and it is further

Ordered that security for costs on appeal be fixed in the sum of $250.00.

Robert P. Patterson, Judge of the District Court for the Southern District of New York.

[File endorsement omitted.]

[fol. 295] Bond for Costs

Bond of American Surety Company of New York in the amount of $250.00 filed July 22, 1931.

In United States District Court

Notices of Appeal—Filed Dec. 15, 1931

[fol. 296] [Title omitted]

July 23, 1931.

The Honorable the Attorney General of the State of New York, Albany, New York.

Dear Sir: You are hereby notified that the Petitioner, New York Central Securities Corporation, has taken an appeal from the final order or decree of the District Court for the Southern District of New York entered June 24th, 1931, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given to you pursuant to Urgent Deficiency Act of October 22, 1913 (38 Stat. 221).

Very truly yours, House, Grossman & Vorhaus, Attorneys for the Appellant, 521 Fifth Avenue, Borough of Manhattan, City of New York, N. Y.

Service of the foregoing Notice and the receipt of a copy thereof are hereby acknowledged this 24th day of July, 1931.

John J. Bennett, Jr., Attorney General of the State of New York.

[File endorsements omitted.]

[fol. 297] July 23, 1931.

The Honorable the Attorney General of the State of Illinois, Springfield, Illinois.

DEAR SIR: You are hereby notified that the Petitioner, New York Central Securities Corporation, has taken an appeal from the final order or decree of the District Court for the Southern District of New York entered June 24th, 1931, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given to you pursuant to Urgent Deficiency Act of October 22, 1913 (38 Stat. 221).

Very truly yours, House, Grossman & Vorhaus, House, Grossman & Vorhaus, Attorneys for the Appellant, 521 Fifth Avenue, Borough of Manhattan, City of New York, N. Y.

Service of the foregoing Notice and the receipt of a copy thereof are hereby acknowledged this 29th day of July, 1931.

Oscar E. Carlstrom, Attorney General of the State of Illinois. D. J. K.

[fol. 298] July 23, 1931.

The Honorable the Attorney General of the State of Pennsylvania, Harrisburg, Pennsylvania.

DEAR SIR: You are hereby notified that the Petitioner, New York Central Securities Corporation, has taken an appeal from the final order or decree of the District Court for the Southern District of New York entered June 24th, 1931, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given to you pursuant to Urgent Deficiency Act of October 22, 1913 (38 Stat. 221).

Very truly yours, House, Grossman & Vorhaus, House, Grossman & Vorhaus, Attorneys for the Appellant, 521 Fifth Avenue, Borough of Manhattan, City of New York, N. Y.

Service of the foregoing Notice and the receipt of a copy thereof are hereby acknowledged this 30th day of July, 1931.

Wm. A. Schnader, Attorney General of the State of Pennsylvania.

[fol. 299] July 23, 1931

The Honorable the Attorney General of the State of Ohio, Columbus, Ohio.

Dear Sir: You are hereby notified that the Petitioner, New York Central Securities Corporation, has taken an appeal from the final order or decree of the District Court for the Southern District of New York entered June 24th, 1931, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given to you pursuant to Urgent Deficiency Act of October 22, 1913 (38 Stat. 221).

Very truly yours, House, Grossman & Vorhaus, House, Grossman & Vorhaus, Attorneys for the Appellant, 521 Fifth Avenue, Borough of Manhattan, City of New York, N. Y.

Service of the foregoing Notice and the receipt of a copy thereof are hereby acknowledged this 3rd day of August, 1931.

Gilbert Bettman, Attorney General of the State of Ohio.

[fol. 300] July 23, 1931.

The Honorable the Attorney General of the State of Michigan, Lansing, Michigan.

Dear Sir: You are hereby notified that the Petitioner, New York Central Securities Corporation, has taken an appeal from the final order or decree of the District Court for the Southern District of New York entered June 24th, 1931, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given to you pursuant to Urgent Deficiency Act of October 22, 1913 (38 Stat. 221).

Very truly yours, House, Grossman & Vorhaus, House, Grossman & Vorhaus, Attorneys for the Appellant, 521 Fifth Avenue, Borough of Manhattan, City of New York, N. Y.

Service of the foregoing Notice and the receipt of a copy thereof are hereby acknowledged this 24th day of August, 1931.

Paul W. Voorhies, Attorney General of the State of Michigan, by Emerson R. Bayles, Deputy.

[fol. 301] July 23, 1931.

The Honorable the Attorney General of the State of Indiana, Indianapolis, Indiana.

DEAR SIR: You are hereby notified that the Petitioner, New York Central Securities Corporation, has taken an appeal from the final order or decree of the District Court for the Southern District of New York entered June 24th, 1931, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given to you pursuant to Urgent Deficiency Act of October 22, 1913 (38 Stat. 221).

Very truly yours, House, Grossman & Vorhaus, House, Grossman & Vorhaus, Attorneys for the Appellant, 521 Fifth Avenue, Borough of Manhattan, City of New York, N. Y.

Service of the foregoing Notice and the receipt of a copy thereof are hereby acknowledged this 24th day of August, 1931.

James M. Ogden, Attorney General of the State of Indiana.

[fols. 302-305] Citation in usual form, showing service on Elmer B. Collins et al., filed September 18, 1931, omitted in printing.

[fol. 306] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING TIME TO DOCKET AND FILE RECORD.

It appearing that the parties and their respective counsel are not in the same City and State and that further time is required to reduce to narrative statement the testimony and exhibits contained in the voluminous transcript of the record of the evidence and proceedings before the Interstate Commerce Commission, now a part of the record before this Court, and to assemble, prepare and certify the transcript of the record of this Court on the appeal, and for other good cause shown, it is hereby

Ordered that the time within which appellant, The New York Central Securities Corporation shall furnish, serve and file in the office of the Clerk of the District Court their narrative statement of the evidence offered before the District Court and their designation of the record, and in which to cause the transcript of the record to be completed and to docket the same and file the record thereof with the Clerk of the Supreme Court of the United States, be, and it is hereby, enlarged to and including Thursday, the 15th day of October, 1931.

Frank J. Coleman, United States District Judge for the Southern District of New York.

C. M.

August 7th, 1931.

[fol. 307] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR ENLARGEMENT OF TIME—Filed Aug. 8, 1931

Comes now appellant herein, The New York Central Securities Corporation, and respectfully moves this Honorable Court to enlarge the time within which to docket the case and file a record thereof, and for cause respectfully shows:

The record herein is very voluminous and is composed of numerous papers, tables and documentary evidence, together with the stenographic transcripts of oral testimony adduced before the Interstate Commerce Commission.

2. Under the rules of this Court and of the Supreme Court, appellant is required to reduce to narrative statement the said testimony and exceptions contained in the said voluminous transcript of the record of the evidence and proceedings before the Interstate Commerce Commission.

3. The appellees herein are located at points distant from the appellant so that correspondence with them or their counsel must in most cases take place by mail.

4. The appeal herein was allowed on or about July 23, 1931 and appellant has only thirty days from the date of said allowance of the said appeal within which to prepare and certify the said transcript of the record.

Wherefore, the premises considered, appellant herein, The New York Central Securities Corporation, moves this Honorable Court to enlarge the time in which appellant shall furnish, serve and file in the office of the Clerk of the [fol. 308] District Court their narrative statement of the evidence and their designation of the record, and in which to cause the transcript of the record to be completed, and to docket the case and file the record thereof with the Clerk of the Supreme Court of the United States, to and including Thursday, the 15th day of October, 1931.

House, Grossman & Vorhaus, Solicitors for Appellant. Office and P. O. address: 521 Fifth Avenue, New York City.

Consented to.

Elmer B. Collins, Attorney for United States of America. Daniel W. Knowlton, Attorney for Interstate Commerce Commission. Jacob Aronson, Attorney for New York Central R. Co., C., C., C. & St. Louis Rwy. Co., & Michigan Central R. Co.

[File endorsement omitted.]

[fol. 309] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING TIME TO DOCKET AND FILE RECORD

It appearing that the parties and their respective counsel are not in the same City and State and that further time is required to reduce to narrative statement the testimony and exhibits contained in the voluminous transcript of the record of the evidence and proceedings before the Interstate Commerce Commission, now a part of the record before this Court, and to assemble, prepare and certify the transcript of the record of this Court on the appeal, and for other good cause shown, it is hereby

Ordered that the time within which appellant, the New York Central Securities Corporation shall furnish, serve and file in the office of the Clerk of the District Court their narrative statement of the evidence offered before the District Court and their designation of the record, and in which to cause the transcript of the record to be completed and to [fol. 310] docket the same and file the record thereof with the Clerk of the Supreme Court of the United States, be, and it is hereby, enlarged to and including Monday, the 16th day of November, 1931.

Wm. Bondy, United States District Judge for the Southern District of New York.

October 13, 1931.

[fol. 311] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR ENLARGEMENT OF TIME—Filed Oct. 14, 1931

Comes now appellant herein, the New York Central Securities Corporation, and respectfully moves this Honorable Court to enlarge the time within which to docket the case and file a record thereof, and for cause respectfully shows:

1. The record herein is very voluminous and is composed of numerous papers, tables and documentary evidence, together with the stenographic transcripts of oral testimony adduced before the Interstate Commerce Commission.

2. Under the rules of this Court and of the Supreme Court, appellant is required to reduce to narrative statement the said testimony and exceptions contained in the said voluminous transcript of the record of the evidence and proceedings before the Interstate Commerce Commission.

3. The appellees herein are located at points distant from the appellant so that correspondence with them or their counsel must in most cases take place by mail.

4. The appeal herein was allowed on or about July 23, [fol. 312] 1931, and appellant has only thirty days from the date of said allowance of the said appeal within which to prepare and certify the said transcript of the record.

Wherefore, the premises considered, appellant herein, The New York Central Securities Corporation, moves this Honorable Court to enlarge the time in which appellant shall furnish, serve and file in the office of the Clerk of the District Court their narrative statement of the evidence and their designation of the record, and in which to cause the transcript of the record to be completed, and to docket the case and file the record thereof with the Clerk of the Supreme Court of the United States, to and including Monday, the 16th day of November, 1931.

House, Grossman & Vorhaus, Solicitors for Appellant. Office and P. O. address: 521 Fifth Avenue, New York City.

Consented to.

Elmer B. Collins, Special Asst. to the Attorney General, Attorney for United States of America. Daniel W. Knowlton, Attorney for Interstate Commerce Commission. —— ——, Attorney for New York Central R. Co., C., C., C. & St. Louis Rwy. Co., & Michigan Central R. Co.

[File endorsement omitted.]

[fol. 313] In United States District Court

[Title omitted]

Order Enlarging Time to Docket and File Record

It appearing that the parties and their respective counsel are not in the same City and State and that further time is

required to reduce to narrative statement the testimony and exhibits contained in the voluminous transcript of the record of the evidence and proceedings before the Interstate Commerce Commission, now a part of the record before this Court, and to assemble, prepare and certify that transcript of the record of this Court on the appeal, and for other good cause shown, it is hereby

Ordered that the time within which appellant, the New York Central Securities Corporation shall furnish, serve and file in the office of the Clerk of the District Court their narrative statement of the evidence offered before the District Court and their designation of the record, and in which to cause the transcript of the record to be completed and to docket the same and file the record thereof with the Clerk of the Supreme Court of the United States, be, and it is [fol. 314] hereby, enlarged to and including the 16th day of February, 1932.

Nov. 9th, 1931.

Frank J. Coleman, United States District Judge for the Southern District of New York. C. W.

[fol. 315] In United States District Court

[Title omitted]

Motion for Enlargement of Time—Filed Nov. 10, 1931

Comes now appellant herein, the New York Central Securities Corporation, and respectfully moves this Honorable Court to enlarge the time within which to docket the case and file a record thereof, and for cause respectfully shows:

1. The record herein is very voluminous and is composed of numerous papers, tables and documentary evidence, together with the stenographic transcripts of oral testimony adduced before the Interstate Commerce Commission.

2. Under the rules of this Court and of the Supreme Court, appellant is required to reduce to narrative statement the said testimony and exceptions contained in the said voluminous transcript of the record of the evidence and proceedings before the Interstate Commerce Commission.

3. The appellees herein are located at points distant from the appellant so that correspondence with them or their counsel must in most cases take place by mail.

4. The appeal herein was allowed on or about July 23, [fol. 316] 1931, and appellant has only thirty days from the date of said allowance of the said appeal within which to prepare and certify the said transcript of the record.

Wherefore, the premises considered, appellant herein, The New York Central Securities Corporation, moves this Honorable Court to enlarge the time in which appellant shall furnish, serve and file in the office of the Clerk of the District Court their narrative statement of the evidence and their designation of the record, and in which to cause the transcript of the record to be completed, and to docket the case and file the record thereof with the Clerk of the Supreme Court of the United States, to and including the 16th day of February, 1932.

House, Grossman & Vorhaus, Solicitors for Appellant. Office and P. O. address: 521 Fifth Avenue, New York City.

Consented to.

Elmer B. Collins, Special Asst. to the Attorney General, Attorney for United States of America. Daniel W. Knowlton, Attorney for Interstate Commerce Commission. Jacob Aronson, Attorney for New York Central R. Co., C., C., C. & St. Louis Rwy. Co., & Michigan Central R. Co.

[File endorsement omitted.]

[fol. 317] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 318] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF RECORD TO BE PRINTED—Filed Feb. 27, 1932

Comes now appellant in the above entitled cause and, as its statement of points to be relied on, adopts the assign-

ments of error filed herein and states that in support thereof it will be necessary that the entire record filed in the Supreme Court of the United States, with the exception of exhibits 1 and 2, should be printed. However full access to the said Exhibits 1 and 2 shall be allowed counsel for all parties and the Court, as if the same had been duly printed.

[fol. 319] House, Grossman & Vorhaus, William E. Leahy, William J. Hughes, Jr., Attorneys for Appellant.

Service acknowledged.

Daniel W. Knowlton, Daniel *K*. Knowlton, Attorney for Interstate Commerce Commission. 2/27/32. Thomas D. Thacher, Solicitor General, per W. M. S. Jacob Aronson, Jacob Aronson, Attorney for Appellees, Railroad Companies.

[fol. 320] Service of a copy of the within statement and designation is hereby admitted this 24th day of February, 1932.

Jacob Aronson, Attorney for Defendant Railroad Companies.

[fol. 321] [File endorsement omitted.]

Endorsed on cover: File No. 36,521. S. New York D. C. U. S. Term No. 707. The New York Central Securities Corporation, appellant, vs. The United States of America, the Interstate Commerce Commission, the New York Central Railroad Company, et al. Filed February 16, 1932. File No. 36,521.

FILE COPY

MAR 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. [redacted] 5

THE NEW YORK CENTRAL SECURITIES CORPORATION,
Appellant,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Appellee.

JURISDICTIONAL STATEMENT.

HOUSE, GROSSMAN & VORHAUS,
New York City,
Attorneys for Appellant.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Washington, D. C.,
Of Counsel.

CORNELIUS FORD, PRINTER [redacted] 799 13TH STREET N. W.

In The

Supreme Court of the United States

October Term, 1931.

No. 707.

The New York Central Securities Corporation,
Appellant,

v.

The United States of America, *et al.*,
Appellee.

JURISDICTIONAL STATEMENT.

Comes now appellant, by its counsel, and submits the following jurisdictional statement pursuant to Rule 12 of this Court.

This is an appeal from the District Court of the United States for the Southern District of New York, in which appellant seeks a review of a final decree of a special three-judge Court dismissing appellant's bill in a suit by it to set aside and annul two orders of the

appellee, Interstate Commerce Commission, which authorized, respectively, the acquisition of control, through leasing, by the appellee, New York Central Railroad Company, of the systems of the other railroad companies, appellees herein; and the assumption under the leases, by the lessee corporation, of obligation and liability as to securities of its lessors.

(a) Jurisdiction is conferred on this Court by the Act of October 22, 1913, Chapter 32; 38 Stat. 220; 28 U. S. C. A. Chapter 2, Sections 47 and 47a, and Section 238, Judicial Code, as amended; 28 U. S. C. A., Section 345 (4).

(b) The decree to be reviewed was entered June 24, 1931, by the District Court of the United States for the Southern District of New York (R. 262-263). Petition for appeal and assignment of errors was filed in that Court on July 23, 1931 (R. 284, 292), and the order allowing the appeal was granted and filed July 23, 1931 (R. 294), the said order providing that a Transcript of the Record be docketed and filed in the Supreme Court of the United States within thirty days. Bond for costs was filed July 23, 1931 (R. 295). On August 7, 1931, the said Court enlarged the time to docket and file the record to October 15, 1931 (R. 306). On October 13, 1931, the said Court further enlarged the time to docket and file the record to November 16, 1931 (R. 310). On November 9, 1931, the said Court further enlarged the time to docket and file the said record until February 16, 1932, inclusive (R. 314). On February 16, 1932, the appeal herein was docketed in the Supreme Court of the United States (R. 1).

(c) This is a suit under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 219, 220), 28 U. S. C. A., Sections 46, 47, to annul and set aside two

orders of the Interstate Commerce Commission dated respectively July 2, 1929, and December 2, 1929 (R. 228). By the order of July 2, 1929, the acquisition by the New York Central Railroad Company of the control, through ninety-nine (99) year leases, of the railroad system of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, of the railroad system of the Michigan Central Railroad Company and of the railroad properties of the Chicago, Kalamazoo and Saginaw Railway Company, in accordance with the terms of the proposed leases set forth in the application of said New York Central Railroad Company to the Commission and on the conditions prescribed in the Commissioner's reports in the proceedings on said application, was approved and authorized (R. 229). By the order of December 2, 1929, the Commission authorized the New York Central Railroad Company to assume obligation and liability as lessee in respect of certain securities, including the capital stock of the Michigan Cental Railroad Company and of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company (R. 229). The first order above mentioned was made pursuant to Section 5 (2), the second, pursuant to Section 20-a, of the Transportation Act of 1920, 49 U. S. C. (R. 229). The original petition herein related to the first of said orders (R. 9, 27-28). The second order was made after the commencement of the suit and is the subject of the supplemental petition herein (R. 133), filed by leave of the Court (R. 169). Appellant is, and at and since the time of the filing with the Interstate Commerce Commission of the applications here involved, was a minority stockholder of each of the appellee railroad corporations (R. 10, 14-15).

(d) A hearing was had before a special three-judge Court, convened pursuant to the provisions of the Act of October 22, 1913, Chapter 32; 38 Stat. 220; 28 U. S. C. A., Chapter 2, Section 47 (R. 228), and thereafter the said three-judge Court delivered an opinion (R. 228), and on July 23, 1931, entered a decree dismissing appellant's bill upon the grounds and for the reasons set out in said opinion (R. 263).

(e) Jurisdiction of this Court on direct appeal is specifically authorized by the Act of October 22, 1913, Chapter 32; 38 Stat. 220; 28 U. S. C. A., Chapter 2, Sections 47 and 47a, aforesaid; and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, C. 229; 43 Stat. 938; 28 U. S. C. A., Section 345 (4).

WHEREFORE, it is respectfully prayed that jurisdiction on appeal be noted.

HOUSE, GROSSMAN & VORHAUS,
Attorneys for Appellant.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
Of Counsel.

FILE COPY

FILED
SEP 15
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. [redacted] 5

THE NEW YORK CENTRAL SECURITIES CORPORATION,
Appellant,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE MICHIGAN CENTRAL RAILROAD COMPANY,
Appellees.

BRIEF FOR APPELLANT.

HOUSE, GROSSMAN & VORHAUS,
521 Fifth Avenue, New York City,
Attorneys for Appellant.

FREDERICK A. HENRY,
Williamson Bldg., Cleveland, Ohio,
LOUIS J. VORHAUS,
JOSEPH FISCHER,
521 Fifth Avenue, New York City,
of Counsel.

The Hecla Press, 225 Varick St., N. Y. Tel. WAlker 5-1460

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

THE NEW YORK CENTRAL SECURITIES CORPORATION, Appellant, v. THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY and THE MICHIGAN CENTRAL RAILROAD COMPANY, Appellees.	No. 707.

BRIEF FOR APPELLANT.

Statement.

History and Status of the Case.

This is an appeal (R. 226-241) from the District Court of the United States for the Southern District of New York, in which appellant, The New York Central Securities Corporation, seeks a review of the final decree filed June 24, 1931 (R. 212-213), of a special "three-judge" court, dismiss-

ing upon the merits, with an opinion (R. 185-200) and findings of fact and conclusions of law (R. 200-212), appellant's petition (R. 6-23) in a suit, *N. Y. Cen. Securities Corp.* v. *U. S. et al.*, 54 Fed. (2d) 122, commenced in said Court August 21, 1929, to set aside and annul two cognate orders (R. 100-101, 121-122) of the Interstate Commerce Commission, the first of which authorized, among other things, the proposed acquisition by The New York Central Railroad Company of control by lease, under U. S. C., Title 49, Section 5 (2), of the systems of the other appellee railroads, the "Big Four" and the Michigan Central (R. 31-101; Finance Docket No. 5690, with which was reported the Big Four's ancillary proceeding, F. D. No. 5688; *New York Central Unification,* 150 I. C. C. 278, being the report and findings, with condition as to "short lines," made on January 14, 1929, "by the Commission," Commissioners Eastman, McManamy and Taylor dissenting; and 154 I. C. C. 489, being the supplemental report and final order made in the same case on July 2, 1929, by the Commission, the same Commissioners dissenting); and the second order authorized under U. S. C., Title 49, Section 20a, the assumption by the lessee of obligation and liability in respect of the securities of the lessors (R. 121-122, 148-155; F. D. No. 7744, with which was reported the Big Four's ancillary proceeding, F. D. No. 7745; *Assumption of Obligation & Liability by New York Central,* 158 I. C. C. 317, decided December 2, 1929, by Division 4, Commissioners Meyer, Eastman and Woodlock).

The jurisdiction of this Court is shown in the separate Jurisdictional Statement already filed herein.

The jurisdiction of the special District Court (R. 7, 8, 102, 185, 201) was duly invoked by the filing of a petition, and by subsequent proceedings taken, pursuant to U. S. C., Title 28, Section 41, subdivision 28, and Sections 43 to 48, inclusive. All the defendants appeared and answered upon the merits both the original (R. 6, 24, 28, 101) and supplemental (R. 117, 144, 158, 160) petitions, and thereby waived objections to the venue, or local jurisdiction, and to all other modal matters (*McLean Lumber Co.* v. *U. S.*, 237 Fed. 460,

464; *cf. Home Furniture Co.* v. *U. S.*, 271 U. S. 456, and *State of La.* v. *Morgan's La. & T. R. & S. S. Co.*, 18 Fed. [2d] 645, 648).

The right of appellant, suing as a minority stockholder and investor in each of appellee corporations, to invoke such special jurisdiction of the District Court, as well as the appropriateness of the grounds asserted and relief demanded for cognizance by such Court in the circumstances of this case, will be shown herein directly after a recital of the facts and of appellant's contentions (*infra*, p. 23). Motions by the Commission and by the United States to dismiss for want of jurisdiction were in effect, except as to some issues, overruled by the District Court (R. 162-163, 188-189). Appellee intervened in the respective proceedings before the Commission and it there urged the same contentions that it later urged in the District Court and now urges here (R. 74-83, 9-20, 107-112). Its ownership of stock in all of said companies, and the allied ownership of shares in the New York Central and Michigan Central by others whom it properly represents and for whom also it sues, is admitted (R. 10, 104), as is also the fact that such ownership antedates any action taken on the part of the railroads for the making of the proposed leases (R. 9-10, 3-4). As a stockholder entitled to equal and fair treatment; as an investor entitled to the protection of its interests adversely affected by a reorganization or acquisition of control authorized by the Commission; and as an intervener before the Commission seeking such equality and protection, this appellant was entitled to maintain its suit before the special District Court, and to have full relief, including a restoration of the *status quo ante*, so far as required for the preservation of its rights, *Chicago Junction Case*, 264 U. S. 258, 267-268, 269-270; *McLean Lumber Co.* v. *U. S.*, 237 Fed. 460, 467.

The Facts.

(a) *Organization and Situs of the Railroads.*—The New York Central Railroad Company is a railroad corporation of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, formed in 1914 by the consolidation of eleven carrier companies, including the New York Central & Hudson River Railroad Company and the Lake Shore & Michigan Southern Railway Company (R. 7, 25, 28, 102; I. C. C. Rec., F. D. No. 5690; Witness Stephenson's Ex. 1).

The Big Four is a railway corporation of the States of Ohio and Indiana formed in 1889 by the consolidation of three constituent companies (*Id.*, and Stephenson's Ex. 2).

The Michigan Central is a railroad corporation of the State of Michigan (*Id.*, and p. 38 of Witness Horst's Ex. 40 and Stephenson's Ex. 3).

(b) *Stock Control of Lessors by Lessee.*—As of December 31, 1926, the New York Central owned 84,681 shares of the preferred stock of the Big Four, of a par value of $8,468,100, which is 84.694 per cent. of the total amount of such preferred stock outstanding, namely, 99,985 shares. It also owned 429,411 shares of the common stock of that company of a par value of $42,941,100, which is 91.308 per cent. of the total amount of such common stock outstanding, namely, 470,287 shares. The New York Central also owned 185,762 shares of the capital stock of the Michigan Central of a par value of $18,576,200, which is 99.145 per cent. of the total amount of such stock outstanding, namely, 187,364 shares. These percentages have been increased by purchases from individual minority stockholders both before and since the District Court's decision. The New York Central also owned 40 per cent. of the total outstanding capital stock of the Chicago, Kalamazoo & Saginaw Railway Company, the remaining 60 per cent. of such outstanding capital stock being owned by the Michigan Central. The entire capital stock of Evansville, Indianapolis & Terre Haute Railway Company was owned by the Big Four, which also owned 97.72 per

cent. of the outstanding capital stock of the Cincinnati Northern Railway Company (R. 11, 104; I. C. C. Rec., F. D. No. 5690; Witness Porter's Ex. 35; Application of New York Central, pp. 4-5; Application of Big Four, p. 4).

(c) *Network of Railways Under Single Control.*—The proposed lessor and lessee lines constitute the major portion of the system known as the New York Central Lines (I. C. C. Rec., F. D. No. 5690; Crowley, p. 550).

The key map (*Id.*, Map No. 1 of Witness Voorhees' Ex. 41) shows that the New York Central (shown in red on said map) owns and operates a railroad extending from New York City to Buffalo, and thence along the southern shore of Lake Erie and through northern Pennsylvania, Ohio, Indiana and Illinois to Chicago, with numerous owned or leased lines in all of said states, other states and the Dominion of Canada.

The Big Four (shown in green on said map) owns and operates a railroad extending from a connection with the New York Central at Cleveland to Columbus, Cincinnati, Indianapolis, St. Louis and Chicago; with other terminal points and numerous branch lines, owned or leased.

The Michigan Central (shown in purple on said map) owns or leases and operates a railroad which extends from Buffalo along the north side of Lake Erie and through the Dominion of Canada, the southern Michigan peninsula, and along the southern part of Michigan to Chicago, and from Detroit, Mich., to Toledo, Ohio, together with other terminal points and numerous branch lines in Michigan, Ohio, Indiana and Illinois.

The Chicago, Kalamazoo & Saginaw Railway Company (shown in yellow on said map) operates a line extending from Woodbury, Mich., through Kalamazoo, Mich., with additional mileage extending from Pavilion Junction to Pavilion, Mich.

The Cincinnati Northern Railroad Company (shown in brown on said map) operates a line extending from Jackson, Mich., to Franklin, Ohio, and thence by trackage over the

Big Four to Cincinnati. It connects with the New York Central lines at Bryan, Ohio, and with the Michigan Central's main line at Jackson, Mich.

The Evansville, Indianapolis & Terre Haute Railway Company (shown in blue on said map) operates a line extending in a northerly and southerly direction between Evansville and Terre Haute, Ind., connecting with the Big Four at Terre Haute.

The railroads and properties of the Cincinnati Northern Railroad Company and of the Evansville, Indianapolis & Terre Haute Railway Company are controlled through stock ownership by, and will (subject to the Commission's authorization) be leased to, the Big Four. Thereupon such proposed leaseholds will be transferred to the New York Central (R. 9, 103).

(d) *Parallel and Competing Lines.*—Upon the consummation of all the leases, including the proposed direct leases of the Big Four and Michigan Central to the New York Central, the latter will own in fee or under lease and will operate as one railroad system many parallel and hitherto competing lines, including the three separate rail routes of the New York Central and the Michigan Central between Toledo, Ohio, and Chicago, Ill.; the two distinct trunk lines of the New York Central and the Michigan Central between Buffalo, N. Y., and Chicago, Ill.; the two distinct lines of the New York Central and the Michigan Central between Detroit, Mich., and Toledo, Ohio; and the two rail routes of the New York Central and the Big Four between Cleveland, Ohio, and Chicago, Ill.; with many other and intermediate intersections and interconnections of competing lines of the parties to the proposed leases (R. 9, 103).

There are twenty two junction points where traffic is interchanged between the New York Central and the Michigan; two where traffic is interchanged between the Big Four and the Michigan Central; two where traffic is interchanged between the Kalamazoo and the Michigan Central; and one where traffic is interchanged between the Cincinnati North-

ern and the Michigan Central (I. C. C. Rec. F. D. No. 5690; Witness Voorhees' Ex. 1, and pp. 113 and 117).

There are twenty junction points where traffic is interchanged between the Big Four and the New York Central; five where traffic is interchanged between the Big Four and the Cincinnati Northern; and one where traffic is interchanged between the Big Four and the Terre Haute (*Id.*, Voorhees' Exs. 41, 43, and pp. 116 and 117).

The yearly interchange between the proposed lessor and lessee lines, during the year ending September 30, 1926, amounted to 1,193,472 loads and 786,231 empties, or a total of 1,979,703 cars. The daily average interchange of cars during an eight-day test period, ending March 23, 1926, between the Big Four and the New York Central, was 2,324 cars; between the New York Central and the Cincinnati Northern, 59 cars; between the New York Central and the Michigan Central, 1,741 cars; between the New York Central and the Kalamazoo, 23 cars; between the Big Four and the Michigan Central, 396 cars; between the Big Four and the Cincinnati Northern, 442 cars; between the Big Four and the Terre Haute, 395 cars; between the Michigan Central and the Cincinnati Northern, 247 cars; and between the Michigan Central and the Kalamazoo, 75 cars (*Id.*, Vorhees' Ex. 43).

(e) *Reasons for Acquisition of Control by Lease.*—In the application of the New York Central for authority to acquire control under lease, it was alleged (*Id.*, pp. 2, 3) that the acquisition of control would be in the public interest for the reasons, among others:

> "The lines of railroad now operated by the applicant and those proposed to be operated by it under the provisions of the proposed leases are now operated as parts of the New York Central Lines system, of which the applicant is the parent company. Through the proposed leases economies will be effected and increased efficiency and improved service will result in the administration and operation of the said lines of railroad."

The petition alleges common control by the New York Central and the answer of the railroads admits that all of the railways and systems involved in the proposed leases are now being operated in common control with the New York Central under the common designation, "The New York Central Lines," with substantially identical or closely interlocking boards of directors and certain common administrative or executive officers (R. 11-12, 105).

The economies which it is anticipated will be effected are, in forwarding freight along the most economical route, to the extent that the shipper leaves the route open (I. C. C. Rec., F. D. No. 5690; Crowley, pp. 551, 552; Ingalls, pp. 141-148; Webster, pp. 174-218); in transportation operations (*Id.*, White, pp. 226-259; Evans, pp. 281-286); in the accounting department (Wishart, pp. 271-277); and in repair of equipment (*Id.*, Hardin, pp. 288-293).

(f) *Terms and Conditions of the Leases.*—The proposed leases are annexed to the application (*Id.*). Each is for ninety-nine years (Big Four Lease, p. 18; Michigan Central Lease, p. 14). The lessee agrees to pay the lessor's fixed charges (Art. II), and to stockholders, other than the lessee (*i. e.*, to minority stockholders), an amount equal to dividends on the preferred stock of the Big Four and an amount equal to $10 per share per annum on the common stock of the Big Four, and $50 per share per annum on the stock of the Michigan Central (Art. II, subd. 5), with separate provision as to Michigan Central stock pledged as collateral security. The "Ratio of Rentals to Average Net Earnings" for the years 1922-1927 is, for Big Four common stock, 50 per cent., and for Michigan Central stock, 58 per cent., as shown to the Commission by applicant's tabular exhibit reproduced in the Commission's report and the District Court's opinion (R. 81, 194). The latter ratio is considerably changed by taking instead the six years ending with 1929. All cash and current assets of the lessor are included in the lease, any balance thereof, after application thereof to the payment of existing current and deferred liabilities of the lessor, to be restored on the termination of the lease (Art. IV). The

lessee is to maintain the leased properties in repair (Art. VII, subd. b), but all betterments are to be at the cost of the lessor (Art. VIII, Sec. 4; Art. IX, Secs. 1-4). The lessee is authorized to abandon, retire, sell or otherwise dispose of any line or lines of railway and any material, equipment or other tangible personal property not required in its judgment for the proper operation and maintenance of the demised premises, and any lands, buildings, structures or facilities no longer required for such operation. Consent of lessor's board is required for disposal of essential parts of leased lines or the voting of lessor's holdings of subsidiaries' securities for the disposal of their lines. Proceeds are to be applied for the improvement of the leased property, and balance of such account either way is payable in cash at expiry of the lease (R. 105-106; Big Four Lease, Art. VI, Sec. 3; Michigan Central Lease, Art. V, Sec. 3); and lessee may extend or change the leased lines (Sec. 2).

(g) *Michigan Central's Net Income Per Share.*—From January 1, 1923, to December 31, 1928, the net income per share of the Michigan Central available for dividends, and the amount of dividends paid from such net income in each year, have been as follows (R. 16, 109-110, 171):

Year	*Net Income Per Share*	*Dividends Paid Per Share*
1923	$ 75.66	$20.00
1924	72.73	20.00
1925	100.37	27.50
1926	101.21	35.00
1927	90.02	40.00
1928	103.49	40.00
1929	103.20	40.00

Its surplus on January 1, 1915, was $16,709,236; on April 30, 1926, it was $82,779,597; and as of December 31, 1928, it was $100,428,397 (R. 110). The average annual net income for the five years (1925-1929) preceding the lease was $99.66 per share.

(h) *Value of Michigan Central Stock.*—In proceedings before the Commission for the valuation of the Michigan Central, certain tentative values as of June 18, 1913, were fixed in 1925, for its property used in transportation. The Michigan Central filed a protest, August 25, 1925, in which it claimed the cost of reproducing its properties used in transportation as of said valuation date, to be $399,344,283 (I. C. C. Rec., F. D. No. 5960, pp. 438, 450, 451); adding thereto investment to April 30, 1926, of $72,579,662 (see *Id.*, pp. 438-439), and excess of current assets over current liabilities on the same date, $23,260,669, and subtracting the equipment and mortgage indebtedness on the same date, $76,267,012, the total value of the stockholders' equity was then $418,917,602, which is, in relation to the capital stock of $18,736,400 (*Id.*, p. 418), equivalent to $2,235.85 per share of $100 par value. But in the present proceeding before the Commission the Michigan Central's claimed "Stockholders' Equity per share, Nov. 1, 1927," is valued in its behalf at $639.78 (R. 82). The New York Central's reports to the Commission disclose that in the two years ended December 31, 1931, it had purchased 275 shares of Michigan Central stock on an average price of $1,521.75—the last as high as $1,614.91.

(i) *Value of Big Four Stock, and Net Income Per Share.*—The Big Four claimed in the valuation proceedings before the Interstate Commerce Commission (Valuation Docket 264, p. 144) that the valuation of its property as of July 1, 1915, was $315,782,433 (I. C. C. Rec., F. D. No. 5960, Ex. 54, p. 632), and that additions and betterments made from July 1, 1915, to November 30, 1926, were $105,849,388. After adjustments relating to depreciation, cash and materials on hand, the valuation at November 30, 1926, was $408,719,773 (*Id.*, Ex. 55).

During the years 1927, 1928 and 1929, prior to the execution of the lease, further additions, betterments and investments in property were made to the extent of $27,299,350, and during the same period the indebtedness was increased approximately $12,606,800, as shown by the annual reports of the company for those years, or an increase in the value

of the property, above the indebtedness contracted therefor, of approximately $14,700,000, which inure to the benefit of the common stock, being about $31.26 per share.

The "fair return" fixed by the Commission, under the authority of Section 15a of the Interstate Commerce Act, is 5.75 per cent. (*Id.*, p. 396). Applying this rate to the valuation placed by the Big Four on its own property as of November 30, 1926, to wit, $408,719,773, the net income which the company was entitled to earn equalled $23,501,387, or $32.92 per share on the common stock.

As shown by the annual report of the company for the year ended December 31, 1926, the indebtedness of the company was $159,098,510, exclusive of current liabilities, which were offset by current assets. Deducting from the claimed valuation of $408,719,733, the indebtedness of $159,098,510, there remained an equity of $249,621,223 to represent the value of the outstanding $57,027,200 capital stock—preferred and common. Deducting from this equity of $249,621,223 the amount of $9,998,500 of 5 per cent. preferred stock at par, would leave $239,622,723 as the company's claimed value of 470,287 shares of common stock on November 30, 1926, or $509.95 per share, to which should be added the $31.26 per share for additions, betterments, etc., in 1927, 1928 and 1929, making $541.21. (In the present proceeding, however, before the Commission, the Big Four's claimed "Stockholders' Equity per share, Nov. 1, 1927," is reduced in its behalf to $201.75 for the common—R. 82.) The New York Central's reports to the Commission disclose that in the three years ended December 31, 1931, it had purchased 33,449 shares of Big Four common stock at an average price of $243.43—the last as high as $288.49.

The following statement shows the net income per share on common stock earned by the Big Four for the five years (1925-1929) next preceding the execution of the leases, after payment of all prior charges, including preferred stock dividends, and also shows the amount of dividends paid on the common stock:

Year	Per Cent. Earned on Common	Paid on Common
1925	25.22	$ 5.00
1926	23.07	7.00
1927	17.49	7.50
1928	17.58	8.00
1929	18.42	8.00
Total per cent. earned	101.78	$35.50
Average per year	20.35	7.10

The net income earned for the common stock for the year 1925 and dividend paid thereon are shown by one of the unnumbered exhibits annexed to the New York Central's application for authority to lease the Big Four and Michigan Central; and for the years 1926 to 1929, inclusive, are shown by the annual reports of the company for those years, offered in evidence (R. 165-185).

(j) *Testimony of Lessee's Officers as to Terms.*—Mr. A. H. Harris, vice-president and chairman of the Finance Committee, testified that he thought it no part of his obligation or duty in the quasi-fiduciary capacity of the New York Central, as the majority stockholder in this transaction, to make any inquiry in regard to what might be obtained for the leases of these properties at the hands of other possible lessees (R. 218). President Crowley testified likewise (R. 218-221). He admitted that possibly a much better bargain for the minority stockholders might have been obtained (R. 221). He admitted that for both leases the New York Central would not let this property go elsewhere at double the rental stipulated in these proposed leases (R. 219-220).

(k) *Lessee's Unauthorized Voting of Michigan Central Stock.*—On April 13, 1898, the New York Central & Hudson River Railroad Company, a corporate predecessor of the New York Central, executed a collateral trust indenture to the Guaranty Trust Company of New York, with the obligation of which the New York Central as successor in interest of the New York Central & Hudson River Railroad Company

is charged. By said indenture, all shares of the capital stock of the Michigan Central then owned or thereafter acquired by the New York Central & Hudson River Railroad Company were pledged to secure the payment of an authorized issue of 3½ per cent. gold bonds of the New York Central & Hudson River Railroad Company, payable February 1, 1998 (I. C. C. Rec., F. D. No. 5690, pp. 416-417, Ex. 47). Of these bonds, $19,336,000 are still outstanding (R. 18-20, 111-112).

By the terms of the indenture, it is provided in Sections 2 and 5 of Article Three as follows:

> "Section 2. But under no conditions shall either the Railroad Company or the Trustee, either by vote, or by abstaining from vote, or otherwise permit, but on the contrary, in every lawful way, by vote and otherwise, they shall oppose any increase of the capital stock of the Michigan [Central Railroad] Company, and (unless expressly authorized by the holders of 75% in amount of the bonds issued and outstanding under this indenture) any consolidation of the Michigan Company with any other railway or transportation company, either by purchase of stock or otherwise. * * *
>
> Section 5. The pledge hereunder of the said shares shall not prevent the consolidation or merger of the Michigan Company with, or the sale, conveyance or transfer of its property to the Railroad Company [meaning New York Central], upon such terms as shall be approved by the holders of 75% in amount of the bonds secured by this indenture; but, anything in this indenture contained to the contrary notwithstanding, in case of such express approval, but not otherwise, such consolidation, merger or sale may be made under any laws to which such companies then may be subject: Provided that in connection with such consolidation * * *. But no merger, consolidation or lease shall be made or permitted as in this section authorized, unless nor until the Railroad Company shall first," etc.

The pledged majority stock of the Michigan Central has been voted by the New York Central in favor of the proposed leases, without the authority or approval or any attempt to

obtain the assent of the holders of 75 per cent. in amount of the bonds issued and outstanding (I. C. C. Rec., F. D. No. 5690, pp. 656-657).

(l) *Compulsory Acquisition of Short Lines.*—Before the Commission, there were interventions on behalf of a number of so-called short lines, which urged that the leases should be authorized only on condition that provision be made for incorporating them in the unified system.

The New York Central originally opposed these short-line interventions on the ground that this proceeding related merely to the leasing of properties which were already a part of the New York Central System and did not involve the building up of an enlarged system; that therefore this was not a proper occasion for the consideration of the inclusion of any so-called short-line railroads; and that the Commission was not authorized to make another acquisition a condition of the making of the acquisition proposed (I. C. C. Rec., F. D. No. 5690, p. 168; see testimony of Harris, pp. 455-458).

The Commission, in its report of January 14, 1929, gave its authorization upon the express condition that before the leases should become effective, the New York Central should offer to acquire the lines of the Boyne City, Gaylord & Alpena Railroad, the Chicago, Attica & Southern Railroad, the Federal Valley Railroad, the steam railroads of the Fonda, Johnstown & Gloversville Railroad, part of the properties of the Owasco River Railway, and the lines of the Ulster & Delaware Railroad (*New York Central Unification*, 150 I. C. C. 278, R. 84).

As to Boyne City, Gaylord & Alpena Railroad, it appeared that the entire line was in poor condition (R. 56; I. C. C. Rec., F. D. No. 5690, pp. 1882-1889); that its rehabilitation and maintenance would impose a heavy burden (*Id.*, pp. 1889-1892); that its operating expense would be increased (*Id.*, pp. 1901-1902) and that its traffic is on the decline (*Id.*, p. 1909). With the exception of 1923, it has operated at a loss since 1922 (*Id.*, Ex. 117, No. 53; Exs. 250, 251, R. 55).

The Chicago, Attica & Southern Railroad would be of no value to the New York Central, as there are already in operation in its territory lines with more favorable grades and facilities (R. 59; I. C. C. Rec., F. D. No. 5690, p. 1289). It would have to be rebuilt before it could be operated by the New York Central (*Id.*, pp. 1289-1290). Rehabilitation will cost over a million dollars (*Id.*, p. 1283). Maintenance and operation would entail increased expense (*Id.*, p. 1291). The population in the territory it serves has decreased (*Id.*, Exs. 189, 190, 193) and is served by bus and trucking companies (*Id.*, p. 1302). From 1923 to 1926, inclusive, it has operated at a loss (*Id.*, Ex. 117, No. 35, p. 2; Exs. 96, 224).

The inclusion of the Federal Valley Railway would involve additional expense for rehabilitation and maintenance (*Id.*, Exs. 170, 171), and increased operating costs (*Id.*, p. 1219). Since January 1, 1921, it has operated at a loss (*Id.*, Ex. 117, No. 13; Ex. 76, R. 64).

The inclusion of the Fonda, Johnstown & Gloverville Railroad (subsequently eliminated by the Commission—R. 3) would have involved the cost of rehabilitation (R. 65; I. C. C. Rec., F. D. No. 5690, p. 1139), increased cost of operation (*Id.*, pp. 1143, 1144). Its territory is served by truckmen (*Id.*, pp. 1153, 1155). There has been a continuous falling off in passenger business since 1923 (*Id.*, p. 1186). Its net income has declined steadily since 1923 and during the first eleven months of 1927 a deficit was sustained (*Id.*, Ex. 117, No. 1, p. 2; Exs. 86, 217, 220).

The Owasco River Railway is engaged exclusively in switching service (*Id.*, pp. 1593, 1619). It has suffered deficits since 1923 (*Id.*, Ex. 117, No. 30, p. 2; Ex. 244, R. 68).

The passenger traffic of the Ulster & Delaware Railroad is rapidly decreasing due to the competition of motor busses and private automobiles (*Id.*, pp. 1017-1020, 1024, 1027). With the exception of 1923, there has been a continuous decline in total operating revenues since 1922, with deficits in 1925, 1926, and nine months of 1927 (*Id.*, Ex. 117, No. 47, p. 2; Exs. 62, 142, R. 71).

By the Commission's supplemental report of July 2, 1929 (*New York Central Unification*, 154 I. C. C. 489, R. 94), it

appeared that the New York Central had obtained an option to purchase all of the Owasco's capital stock for $75,000 in cash; that it had conducted negotiations with the five other short-line carriers, and, not reaching an agreement with any of them as to the commercial value of their various properties, had given all of them, except the Fonda, notice of its desire to arbitrate the matter of consideration; that it entered into arbitration agreements with the Federal Valley and the Alpena; that arbitrators between the New York Central and the Ulster had been chosen, as also between the New York Central and the Attica; and that it made to the Fonda a proposal to arbitrate. These steps the Commission found to be in *bona fide* compliance with the condition prescribed in their previous report, and accordingly they made the order of July 2, 1929 (R. 23), against which the original petition herein is directed.

It is further shown that subsequently the reports and orders of the Commission were amended by eliminating the Fonda; that it approved the acquisition by the New York Central of control of the Owasco by purchase of its capital stock for $75,000, which has since been effected (162 I. C. C. 200); that an agreement was reached, subject to the approval of the Commission, for the purchase by the New York Central of the entire capital stock of the Federal Valley for $150,000, the amount found by a majority of the arbitrators (162 I. C. C. 156); that in the case of the Ulster & Delaware, the arbitrators, by a majority report (two to one), determined the commercial value of its properties to be $4,100,000 and the Ulster & Delaware thereupon petitioned the Commission to direct the New York Central to take over its properties for that consideration, but said petition was denied; that the minority arbitrator fixed such value at $1,813,333 and the New York Central filed its application with the Commission to acquire the Ulster & Delaware for that sum, which application was at the time of the trial below still pending undetermined before the Commission; and that with respect to the Chicago, Attica & Southern, and the Boyne City, Gaylord & Alpena, the matters were then still pending undetermined by the arbitrators (cf. 167 I. C. C. 295).

Specification of Errors to Be Urged.

The District Court erred:

1. In holding that at the hearings held by the Interstate Commerce Commission upon the application of the New York Central Railroad Company (F. D. No. 5690), for authority to acquire control, under lease, of the railroad systems of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (Big Four), of the Michigan Central Railroad Company (Michigan Central) and of the Chicago, Kalamazoo & Saginaw Railway Company, the New York Central Railroad Company introduced material, relevant and competent evidence in proof of the fact that the acquisitions of control of the Big Four and Michigan Central under leases in the forms attached to said application, were in the "public interest" and for such considerations and on such terms and conditions as were just and reasonable in the premises.

2. In holding that the order of the Interstate Commerce Commission, dated July 2, 1929, in said case (F. D. No. 5690), authorizing and approving said acquisitions of control, and the findings contained in its reports of January 14, 1929, and of July 2, 1929, upon which the said order was based, were supported by competent and substantial evidence.

3. In holding that at the hearing held by the Commission upon the application of the New York Central Railroad Company, recorded under F. D. No. 7744, for authority to assume obligation or liability, in connection with said leases, in respect of the securities of the respective lessor companies, the New York Central Railroad Company introduced material, relevant and competent evidence in support of said application.

4. In holding that the order of December 2, 1929, of the Interstate Commerce Commission in said matter (F. D. No. 7744), authorizing the New York Central Railroad Company, as lessee, to assume obligation and liability, in respect of the securities of the lessor company, and the findings of the Commission in its report of even date, upon which the order was based, were supported by competent and substantial evidence.

5. In holding that the findings of the Interstate Commerce Commission upon the application of the New York Central Railroad Company (F. D. No. 5690) that for the acquisition of control of the Big Four and Michigan Central the considerations and terms and conditions set forth in the proposed leases were just and reasonable, were supported by competent and substantial evidence.

6. In holding that the orders, entered by the Interstate Commerce Commission, authorizing and approving the acquisition of control of the Big Four and Michigan Central, as prayed for in said application (F. D. No. 5690), were within the jurisdiction of the Commission and valid in all respects.

7. In holding that upon the findings by the Commission in the application recorded in F. D. No. 5690 and under the orders entered by the Commission upon such findings, authorizing and approving the leases of the Big Four and Michigan Central Railroads, the carriers affected by said orders were, pursuant to the provisions of paragraph 8 of Section 5 of the Interstate Commerce Act, relieved from the operation of the "anti-trust laws" and of all other restraints by law, State or Federal, in so far as may be necessary to enable said carriers to do anything authorized or required by said orders under and pursuant to paragraph 2 of Section 5 of said Act.

8. In holding that paragraph 2 and paragraph 8 of Section 5 of the Interstate Commerce Act are constitutional

and within the power of Congress to enact, and the powers therein conferred upon the Commission and herein exercised were lawfully conferred upon it.

9. In holding that the order entered by the Interstate Commerce Commission (F. D. 7744), authorizing and approving the assumption of obligation or liability by the New York Central Railroad Company, in respect of the securities of its lessor companies, was within the jurisdiction of the Commission and valid in all respects; and that the jurisdiction of the Commission, in respect of such assumption of obligation or liability, was exclusive and plenary.

10. In holding that the leasing by the New York Central Railroad Company of the railroad systems of the Big Four and of the Michigan Central, for the considerations and upon the terms and conditions set forth in the proposed leases thereof, was within the corporate powers of the lessor and lessee companies; and that such leases, upon the authorization and approval by the Commission, under paragraph 2 of Section 5 of the Interstate Commerce Act, are legal and valid.

11. In holding that the leases of the Big Four and Michigan Central having been found in the "public interest" and the considerations and terms and conditions of said leases having been found just and reasonable in the premises by the Commission, pursuant to the provisions of paragraph 2 of Section 5 of the Interstate Commerce Act, the same are not subject to attack in a suit brought by a minority stockholder of either the lessor or lessee companies, on the ground of an alleged conflict with the restrictions contained in Section 8809 of the General Code of Ohio, and/or with other limitations of said law alleged in the petition herein.

12. In holding that after control has been acquired through stock ownership and interlocking directorates, the

Commission has authority to approve leases on the basis of "public interest."

13. In holding that, in construing Section 5 (6) and Section 5 (2) of the Interstate Commerce Act, Congress laid down no test for consolidation other than ownership by one corporate entity.

14. In holding that the standard of judgment of what may be "in the public interest," provided by the Interstate Commerce Commission, was not too vague to be applicable and enforceable herein.

15. In holding that the dividend rentals were adequate and reasonable.

16. In holding that an inquiry by the Court below as to whether dividend rentals were adequate and reasonable, would involve a substitution of that Court's judgment for the judgment of the Interstate Commerce Commission.

17. In holding that the Commission did not abuse its discretion in authorizing the leases on the terms therein specified.

18. In holding that the finding of "public interest" was sufficiently supported by the evidence before the Commission.

19. In holding that the Commission had power to condition its authorization in F. D. No. 5690 upon the acquisition of the short lines for which the New York Central and Big Four had not applied and which they strenuously resisted.

20. In holding that the petitioner cannot assert the invalidity of such an order.

21. In holding that the Interstate Commerce Commission was empowered or entitled to disregard in the present case

prohibitions against the action taken herein existing under the laws of the State of Ohio and/or other States.

22. In holding that the danger of subsequent action by bondholders was too remote to constitute petitioner a party in interest under the trust agreement, entered into by the New York Central Railroad Company, pledging stock it owned in the Michigan Central.

23. In holding that the equitable right of the lessors' minority stockholders, including this petitioner, to require that the terms, conditions and considerations of these leases, if entered into at all, shall be nothing less than the best and most favorable in their behalf obtainable by the dominant party, was justly and reasonably subordinated and surrendered to the public interest by and in virtue of the Commission's permissive orders, thus depriving petitioner of its property without due process of law.

24. In holding that petitioner has shown no cause of action against defendants and is not entitled to any relief at law or in equity in the premises.

25. In holding that the petition filed herein should be dismissed upon the merits, with costs to the defendants.

26. In refusing to enjoin, set aside and annul, as prayed for herein, the orders of the Interstate Commerce Commission complained of, by holding as aforesaid in each and all of the foregoing assignments of error herein.

Appellant's Contentions.

By way of further specification of said errors here relied on, the petitioner contended below and contends here:

POINT I. The New York Central, having already acquired control of the Big Four and Michigan Central by stock ownership, the Commission had no power or jurisdiction to authorize the acquisition of control by lease (*cf.* Assignment of Errors, pars. 1, 2, 5, 6, 12).

POINT II. The acquisition here sought and allowed involves a consolidation beyond the power of the Commission to authorize under Section 5 (2) (*Id.*, 5, 6, 13).

POINT III. The Commission exceeded its lawfully delegated power in authorizing the New York Central Railroad Company to acquire control under lease of carriers whose main lines, together with sundry branches, are parallel and naturally competing with those of the lessee, so that competition between such lines will be suppressed and existing routes and channels of trade and commerce will be deflected; and it acted both arbitrarily and beyond its powers in finding such acquisition of control to be in the public interest (*Id.*, 5, 6, 7, 8, 14, 18).

POINT IV. As exertions of corporate power by the carriers concerned, the proposed leases are not within the sanction of the controlling statute of the State of Ohio; and as combinations of competing lines, they contravene constitutional or statutory limitations of corporate power to enter into such leases in every State they touch; so that on either ground the Commission was without power to approve and authorize them (*Id.*, 6, 7, 10, 11, 24, 25, 26).

POINT V. The lease of the Michigan Central was not duly authorized, having been voted by its majority stockholder contrary to the latter's express covenant with bondholders for whose security such stock is pledged, and also in breach

of said majority stockholder's fiduciary duty to the minority to keep and observe said covenant; and in these circumstances the Commission's refusal to pass upon said question, and its finding that acquisition of control through such lease will be in the public interest, were unreasonable, arbitrary, and unauthorized by Section 5 (2) (*Id.*, 17, 22).

POINT VI. The dividend-rentals stipulated in either lease are, as matter of law, inadequate and unreasonable; and the finding of the Commission, that the consideration, terms and conditions of the leases are just and reasonable, is unsupported by and contrary to the evidence and is an arbitrary and confiscatory act (*Id.*, 1, 2, 5, 6, 15, 16, 17, 23).

POINT VII. The Commission was without power to condition its authorization upon the acquisition of the burdensome short lines, for which the New York Central and Big Four had not applied, and to which they objected and protested; and the orders embodying and enforcing such condition are also arbitrary and confiscatory as to this appellant (*Id.*, 19, 22).

POINT VIII. The leases not being authorized by the Ohio statute, but being in violation thereof, the assumption of obligation and liability thereunder was not for a lawful object within the corporate purposes of the New York Central, and the Commission was without power to authorize such assumption (*Id.*, 3, 4, 9, 10, 11, 21).

CONCLUSION. Each of the orders under consideration should be set aside and the *status quo ante* restored (*Id.*, 1, 9, 15, 24, 26).

Jurisdiction of the District Court.

It having been moved in the District Court (R. 162, 163)—successfully as to some issues (R. 211-212)—that this suit be dismissed for want of jurisdiction under the rule of *Pittsburgh & W. Va. Ry. Co.* v. *United States*, 281 U. S. 479

(herein called the *Pittsburgh Case*), the following analysis is submitted to distinguish the two cases, and to show that the present suit—unique in one vital aspect—is governed rather by the *Chicago Junction Case,* 264 U. S. 258, that permits what in other circumstances the *Pittsburgh Case* forbids, namely, the joinder of grounds appropriate to a plenary suit with those peculiar to a suit brought under the Urgent Deficiencies Act (U. S. C., Tit. 28, Secs. 46, 47) to set aside an order of the Interstate Commerce Commission.

The *Pittsburgh Case* itself expressly distinguishes each of these others, declaring that (pp. 487-488), "Unlike orders entered in cases of reorganization and in some cases of acquisition of control of one carrier by another" (citing in the margin the instant case among others, viz., *N. Y. Central Unification,* 150 I. C. C. 278), "the order under attack does not deal with the interests of investors." Also, "The case at bar is wholly unlike *Chicago Junction Case* (*Baltimore & O. R. Co.* v. *United States*), 264 U. S. 258, 269, where a prayer to set aside the illegal purchase of stock and the lease already made, was held proper as ancillary to setting aside the order of the Commission authorizing the same. There, the joinder was permitted in order to carry out the purpose of Congress to make the judicial review effective."

The unique feature of the present case consists in the minority shareholders of the Michigan Central and the Big Four having not merely the usual interest of holders of securities of railroads that are being leased, but they are additionally and specially affected in that they have involuntarily become also, in fact and in law, actual parties of the third part (though of course not signatories) to the respective indentures of lease by which these properties are demised to the New York Central. This anomaly arises from the fact that the indentures themselves, as approved by the Commission, provide that the consideration, that is to say the rental-dividends, are to be paid by the lessee, not to the lessor companies, but directly to the lessors' stockholders; and the covenant for such payments thus enuring to them is so framed that, by adopting it, they could, in case

of default, maintain actions at law in their own names against the New York Central to recover the stipulated installments as they accrue.

Now Section 5 (2) of the Transportation Act (U. S. C., Tit. 49) gives the Commission power to "approve and authorize such acquisitions" by lease or otherwise (not involving the consolidation of such carriers) "for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." In making such finding of the justice and reasonableness of the consideration, terms and conditions of the acquisition of control by lease which it approved and authorized, the Commission's order not only operated straightway and of necessity upon petitioner's interest and right as a stockholder of the lessor companies, but it expressly found and determined, upon those statutory and jurisdictional issues, adversely to appellant's contention, urged both there and in this suit, which asserts that the considerations, terms and conditions stipulated in the indentures are neither just nor reasonable in the premises, but, conversely, as the bill here in substance charges and avers, are contrary to equity and good conscience, as well as to law.

The *Pittsburgh Case,* when before the Commission, was, as we have shown, a proceeding not under paragraph (2), Section 5 (as is the case in this as well as in the *Chicago Junction Case, supra*), but under paragraph (18), Section 1; and the statutory issues joined there were not whether the consideration, terms and conditions of the proposed transaction (as evidenced in the present case by the lease indentures exhibited by applicant to the Commission) were just and reasonable, but rather were whether or not the transaction there proposed was such that the present or future public convenience and necessity permitted the abandonment or required the extension of the parts of applicant's railroad which it specified. The justice and reasonableness, which the first cited provision of the act prescribes (but which the last cited provision does not include), apply not merely in reference to the public (for here the Commission

must already have found that the acquisition was "in the public interest"), but to the negotiating parties, and also to such others as are directly concerned or participating in the transaction. Thus not only will the setting aside of these leases, which have already been executed, be an item of relief strictly ancillary to and dependent on such judgment as this Court may render to annul the Commission's orders approving and authorizing the same (such relief being also both permissible and needful in order to make the mode of judicial review effective, as Congress intended it to be), but the principles of law and equity, which would warrant the former sort of relief in a plenary suit, are not different from a traverse of the statutory findings (viz., that the consideration, terms and conditions of the acquisition by lease of these carriers are just and reasonable), without which findings, properly supported and sustained by the record of the proceedings before the Commission, a judgment here to set aside its orders would necessarily follow. Of the grounds for relief that are hereinafter presented, not one involves any issue other than those challenging the constitutional or statutory power and jurisdiction of the Commission to make the orders complained of or alleging a mistake of law (which may involve the facts), or else charging such orders to be arbitrary, confiscatory, or unreasonable; that is to say, without due process, without evidence (or incompatible therewith), or conforming to the letter but not the spirit of the law. *I. C. C.* v. *U. P. R. R.*, 222 U. S. 541, 547. In no circumstances are these issues inadmissible in suits to set aside such orders of the Commission. But all of these grounds (including any that would be appropriate to a plenary suit) are alike within the scope of the statutory issues specially prescribed by Section 5 (2); for no terms and conditions nor any consideration, which is not lawful and equitable, can be "just and reasonable" in the premises.

As said by the Court in *Sprunt & Son* v. *United States*, 281 U. S. 249, 257, note: "In the *Chicago Junction Case*, the order violated the plaintiff's right under Par. 2 of Sec. 5 to equal treatment." But "equal treatment" is here men-

tioned only by implication and as involved in the statutory issues, equitable in their nature, which the section prescribes. Their scope, it is true, necessarily defines and limits the scope of this special form of court review. Unless such statutory issues before the Commission are broad enough to warrant, as in the *Chicago Junction Case,* not only the setting aside of the Commission's order, but also the like relief against the executed transaction which it had authorized, then indeed, as declared in the *Pittsburgh Case* (p. 488), "an application for such relief may not be included in a bill under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission." Otherwise, however, as the *Chicago Junction Case* asserts (pp. 269-270), "There is nothing in the legislation to indicate that Congress intended such a limitation of the scope of the relief to be afforded."

One thing further remains to be noted. The Commission's order of July 2, 1929 (R. 100), prescribed that the proposals for acquisition of control, "in accordance with the terms of the proposed leases set forth in the applications, and upon the conditions prescribed in said reports, be and the same are hereby approved and authorized." One of the said conditions provided, "That nothing herein shall be construed to relieve * * * the New York Central from compliance with provisions of law applicable to any assumption of obligations and liabilities, etc., by virtue of execution of proposed leases." This imposed condition had reference to the technical and statutory necessity for a distinct and separate application and proceeding before the Commission under paragraph (2), Section 20-a, which forbids any carrier "to assume any obligation or liability as * * * lessee * * * in respect to the securities of any other person natural or artificial * * * unless and until and then only to the extent that * * * the Commission by order authorizes such * * * assumption." And "The Commission shall make such order only if it finds that such * * * assumption: (a) is for some lawful object within its corporate purposes * * * and (b) is reasonably necessary and appropriate for such

purpose." Thus it came about that further statutory issues had to be determined by the Commission (besides finding the terms, conditions and consideration of these leases to be just and reasonable), viz., whether or not the New York Central's assumption of obligation or liability with respect to paying rental-dividends to the lessor companies' stockholders was for a "lawful object" within its corporate purposes, and whether or not the same was reasonably necessary and appropriate for such purpose. Such determination of the lawfulness and the reasonable necessity and appropriateness of the scheme or plan for and the rate of rental-dividends to be paid by the New York Central to the lessors' stockholders as the consideration for said leases, is of a character which directly affects this petitioner's interest as an investor by the proposal's rigid definition and limitation of the yield, as well as of the whole status, of the shares which petitioner owns in the lessor companies. And here again the definite statutory issues (lawfulness of the object, etc.) before the Commission embrace those herein urged that may be appropriate also to a plenary suit, as looking not only to the annulment of the Commission's approving order, but to the setting aside of the leases as well—such relief herein being properly dependent on and ancillary to any judgment to vacate said order and being likewise consonant with the purpose of Congress to make the judicial review effective.

From the foregoing considerations, we respectfully submit that the *Pittsburgh Case,* properly interpreted and applied, did not and does not warrant the dismissal of this bill or any part thereof for want of jurisdiction of the District Court, or for want of right in this petitioner to invoke its special jurisdiction, or for want of appropriateness of the grounds asserted and relief demanded for cognizance by the specially constituted tribunal.

POINT I.

The New York Central having already acquired control of the Big Four and Michigan Central by stock ownership, the Commission had no power or jurisdiction to authorize the acquisition of control by lease.

This Court will determine whether the Commission's orders exceed the power delegated by statute. *United States* v. *New River Co.*, 265 U. S. 533, 540; *I. C. C.* v. *Ill. C. R. Co.*, 215 U. S. 452, 470; *I. C. C.* v. *U. P. R. Co.*, 222 U. S. 541, 547. The Commission has power by its orders to approve and authorize the acquisition by one carrier of control over another carrier or carriers "either under a lease or by the purchase of stock or in any other manner not involving the consolidation," etc. U. S. C., Tit. 49, Sec. 5 (2).

By its orders here complained of, the Commission authorized the acquisition of control by lease, notwithstanding that the applicant through stock ownership had already acquired control of the same carriers (R. 11, 104, 105; and *cf.* 35, 40, and *Control of Big Four by New York Central*, 72 I. C. C. 96). So emphatic is the statute's disjunctive "either * * * or" as to admit grammatically of no other construction than that of the strict alternative; and the purpose of this paragraph—to provide only for dissoluble combinations—fortifies the syntax. The words of the act being plain and their meaning not doubtful, the Court is not at liberty to depart therefrom. *Matson Navigation Co.* v. *United States*, 284 U. S. 352, 356; *Corona Coal Co.* v. *United States*, 263 U. S. 537, 540; *People of the State of Michigan* v. *Michigan Trust Co.*, U. S. Sup. Ct. 76 L. Ed. (Adv. Op., 684-687); 52 Sup. Ct. Rep. 512-514; *Chicago, etc., Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99; *Old Colony R. Co.* v. *Commr.*, 284 U. S. 552, 560; *United States* v. *Scharton*, 52 Sup. Ct. Rep. 416, 417; *United States* v. *M. P. R. R. Co.*, 278 U. S. 269, 277-278; *Burnet* v. *Chicago Portrait Co.*, 76 L. Ed. (Adv. Op., 359-366).

To escape the express limitation of the power delegated by statute—though on the precise point the opinion seems confused (R. 189-190)—the District Court erroneously applied a canon of construction, departmental practice, which is admissible only to exemplify what is obscure, not to contradict what is express. *Logan* v. *Davis,* 233 U. S. 613, 627. Otherwise every administrative trespass would automatically supply its own further indulgence. The Commission seems never to have disclosed how, if at all, it rationalizes its sanctioning of a lease where the lessee by stock ownership already controls the lessor (R. 83), or to have defended its assumed right to approve repetitive acquisition of control by recourse successively to both branches of the "either * * * or" alternative in its exercise of the power delegated by Section 5 (2). (*Cf.* R. 40, lines 10-21; R. 43, last eight lines). And such construction is an obvious wresting of terms of plain import from their usual and well-understood significance. *United States* v. *First National Bank,* 234 U. S. 245, 259.

In this case the dissents within the Commission show that the practice is deemed to be still open to question by its own members (R. 85, 89, 92) and the same ought certainly to be true of those whose property rights its exercise now first invades. In every earlier case of this sort decided by the Commission, where the proposed lessee already had effective stock control of the lessor, there was apparently no stockholder aggrieved or else none left to object; hence this is the first instance of an unreconciled minority suing to annul an order for such cumulative control.

The minority right here asserted rests on a limitation of the Commission's power the meaning of which is thus so unequivocal and plain that Congress without redundance could not and cannot make it more express, nor departmental practice (except arbitrarily) make it less so. Such minority right is in this case insisted upon because independently of the leases the control previously acquired sufficed if properly utilized (R. 71, 72, 90) to realize the asserted benefits in respect to car mileage, car supply, op-

erating economies, interchange of facilities, and indeed all the indicated purposes except those here challenged and hereinafter discussed, namely, (a) of securing exemption from anti-trust laws (R. 72, 93), and (b) of excluding the minority stockholders in each of the large lessor companies from approximately half their proportionate share of the prospective fruits of its demonstrated net earning power (R. 16, 17, 110); and from any share at all in the predicted savings or augmented net earnings to accrue from the leases (R. 75).

POINT II.

The acquisition here sought and allowed involves a consolidation beyond the power of the Commission to authorize under Section 5 (2).

Effective stock control of the Michigan Central and the Big Four by the New York Central considerably antedates these leases (R. 39, 40), and it is admitted that the carriers which are parties thereto have long been operated in common control as a single co-ordinated system (R. 35, 48), and under the common designation, "The New York Central Lines," with substantially identical or closely interlocking boards of directors and certain common executive or administrative officers (R. 206); and it is also admitted that the leases contemplate complete unification of administration and operation of said properties by the New York Central Railroad Company (R. 104-105).

Reciting the "Reasons urged in support of proposals" for which the approving order herein was sought, the Commission at the outset observes, "The opinion was expressed in the testimony that the leases are steps leading in the direction of consolidation" (R. 47, 48). From applicant's testimony the Commission sees as the one "Purpose of proposals" so submitted for its approval that under stock control alone "the necessity of protecting earnings of each carrier prevents further unification and co-ordination. The purpose of

the proposed leases, it is stated, is to bring about handling of the properties by one strong operating unit" (R. 35). Without such tenure the routing of traffic, for example, "has been hampered by a proper regard for minority interests" (R. 48).

This obstacle is swept away by the leases, and the asserted economies—all previously available to the system and hitherto potentially beneficial to its units (R. 90)—are now to enure exclusively to the New York Central Railroad Company, as lessee, with its unrestricted possession and use of the combined properties as a single unit. The result of this latest step, the so-called acquisition of control by lease as authorized and approved by the orders of the Commission, is here challenged as being in fact and in law the consolidation of the carriers into a single system for ownership and operation (R. 10-12).

The Commission's action thus exceeds the power delegated by statute. In the proper exercise of that power it may by its order approve and authorize the acquisition by one carrier of control of another or others either under lease or by purchase of stock or in any other manner "not involving the consolidation of such carriers into a single system for ownership and operation." U. S. C., Tit. 49, Sec. 5 (2).

The intent of the limitation quoted was to deter the Commission from taking any action—under color of Section 5 (2), and in advance of the promulgating under Section 5 (5) of its nation-wide plan adopted and published since the orders herein complained of were made—which might forestall its exertion of the power conferred by Section 5 (6) to permit carriers "to consolidate their properties or any part thereof into one corporation for the ownership, management and operation of the properties theretofore in separate ownership, management and operation." (Note that if a consolidation be not involved in this proposed acquisition of control under lease, then these last seven quoted words will prevent such consolidation from being hereafter consummated.) Congress in this manner restricted the extent of advance control allowable by the Commission so that the

latter should keep both able and free to unscramble the elements involved in any acquisition of control and to reallocate the same in accordance with the complete plan. *Cf. Control of Big Four by New York Central,* 72 I. C. C. 96, 98, cited *supra;* also *Control of Cen. Pac. by So. Pac.,* 76 I. C. C. 508, 525, reserving right to terminate lease and stock control.

The District Court, however, sustained the orders as being consonant with its own interpretation of this limitation and also with its view of the previous construction thereof by the Commission (R. 190); thereby upholding defendants' contention that the language of the statute and the Commission's departmental practice rebut the proposition that "control by stock or lease or both may be of such degree as to amount to virtual consolidation and thus be beyond the Commission's power to authorize"; or, in other words, that there is any form of unification short of actual acquisition of the general title to properties which may not be carried out under Section 5 (2). But such generalization of an *ultra vires* practice thus attributed to the Commission would carry the asserted course of decision to an extreme that the majority of that body do not even now in terms acknowledge, nor have they officially avowed it by affirmative formulation to be found in the I. C. C. reports.

Undoubtedly the Commission, by allowing combined stock and lease control, had warped its jurisdiction in order to afford relief during and from its long delay in adopting its nation-wide plan of consolidation. But in the New York Central Unification the fusion of carriers is of such degree that no precedent quite so advanced in the departmental practice has been either cited or found (*cf.* R. 93). This more perfect union does not stop with almost identical directorates, common executives, centralized management, nearly 100 per cent. stock ownership, the vast network of intermingled traffic routes to be used interchangeably as a single system (R. 48), and the one corporation possessing and by various tenures owning all the properties concerned. There is not even reservation of right by the Commission to ter-

minate the stock or lease control, but a sealing of that door by elimination of separate operating accounts. Nor is this all. The dominion passed to the New York Central Railroad Company by the leases goes further yet.

Here it will be well to note in passing that the term "consolidation" as commonly employed in State constitutions and statutes does not necessarily import the acquiring of general title to constituent properties but embraces as well what the Commission styles a "unification." *East St. L. Connecting Ry. Co.* v. *Jarvis,* 92 Fed. 735; *Borg* v. *Illinois Terminal Co.,* 16 Fed. (2d) 988, 989; *People* v. *People's Gas Light Co.,* 205 Ill. 482, 492; 1 *Beach on Private Corporations,* Sec. 334. It is still more important to note that while "ownership" is not at common law a technical term but is as broadly inclusive as property and property rights (*B. & O. R. Co.* v. *Walker,* 45 Ohio St. 577; *Chotean* v. *Thompson,* 2 Ohio St. 114; *Fed. Trade Comm.* v. *Thatcher Mfg. Co.,* 5 Fed. [2d] 615, 620, 621), the word especially fits the purposes of Section 5 (2) and 5 (6), since degree of dominion rather than mere kind of title is the basis alike of what the one paragraph undertakes to forbid and the other to permit—inseparable unions of carriers. Under the latter paragraph no technical consolidation of the properties of two or more carriers pursuant to the permanent plan would ever be feasible if a strictly allodial or fee simple title is the only sort of ownership in the "one corporation" that can satisfy the statute.

Every railway system holds its various properties by many and diverse tenures, and, of course, absolute ownership is not ordinarily acquired by the proceeding in eminent domain to which railroads are so often compelled to resort for the acquisition of land. What then distinguishes a "unification" or lawful acquisition of control from a "consolidation" unless it be the avoidance by the former of such degree of dominion over the constituent properties as would make the union practically irrevocable? While absence of "ownership" is a part of the statutory criterion, clearly this is not limited to absolute title.

Consider for example a salient feature of the present case. A prime criterion of ownership is the possessor's right of spoil (*Bouvier's Dict.*), i. e., the right to consume, to destroy, or to dispose of property in possession, with or without having finally to account for it. Tested thus by the intent of the Transportation Act and by both the legal and the common acceptation of its words, this lessee's dominion, especially as enlarged by the leases in manner now to be shown, becomes—and its proprietary control of the New York Central Lines constitutes—the consolidation of such carriers into a single system for ownership no less than for operation, as contemplated by Section 5 (2) and (6).

In their main provisions the leases of the Michigan Central and of the Big Four are identical (R. 45), including those of the former about to be cited (R. 12, 45-47, 105-106). Article V, Section 3, provides that the lessee may, except to the extent of impairing the general integrity and continuity of lessor's transportation system, sell or otherwise dispose of lines of railway or tangible personal property not required in its judgment for proper operation and maintenance of the leased properties and expend the proceeds for additions or improvements thereon (R. 106). By Article IV, Section 1, lessee is to take over all cash of and collect all dues owing to lessor and sell all its Government bonds and notes, with like application of proceeds after discharge of lessor's liabilities. With the consent of lessor's board of directors, which is substantially identical with lessee's board (R. 105), other and essential lines or properties may be similarly disposed of (R. 106). Under Article VII (b), (c) and (d), the lessee with like consent may exercise the voting power on lessor's holdings of any subsidiary's securities for the like disposal of the latter's lines and property, or it may dispose of the securities and apply the proceeds as so consented to. By Article VIII, at expiry of the lease, return of rolling stock, equipment, etc., may be of equivalents in appraised value and general kind; and by Article IX, Section 7, the balance of account either way shall then be paid in money (R. 45).

Thus with the Commission's approval of the terms of each lease as authorized in advance by the stockholders and the directors and executed accordingly by its officers, the lessor thereby surrenders presently to the lessee its dominion over the leased property upon the latter's promise to account at termination for the same or its equivalent in kind or money, with only the stipulation that as to essential parts disposal and application of proceeds shall be by leave of lessor's board —a formality always and exclusively within lessee's power at pleasure to discharge without further order by the Commission or further approval by lessor's stockholders. Congress' aim was not so. When a lessee owns a lessor's capital stock, the reversion has been aptly called an "empty shell." By these indentures the lessee is in addition empowered to commute the shell.

In the present case as thus discriminated, departmental practice should not be held to validate a usurpation that outstrips any clear precedent the Commission had theretofore established; else progressive administrative encroachment could never be judicially curbed. Of its previous decisions approving unifications under Section 5 (2)—decisions which fall short of this latest mark though claimed by appellees to embrace it in principle—the circumstance that not one has been judicially tested cannot warrant the inference of final acquiescence in such supposed trend and asserted goal of administrative practice so long as there lacked a substantial invasion of minority right or other sufficient occasion for seeking a court review.

The Commission, moreover, has vacillated in its allowance or denial of proposed expansions and combinations of railroad properties under Sections 1 (18) and 5 (2) (see *Consolidation of D. T. & I. and D. I. R. R.*, 124 I. C. C. 145, 159; and *cf. Acquisition and Stock Issue by N. Y., C. & St. L. R. R. Co.*, 79 I. C. C. 581), and has itself intimated that its own decisions under divers provisions of the Transportation Act are not to be deemed binding upon it (*Securities of La. Ry. & Nav. Co.*, 99 I. C. C. 357); whence it follows that for an accepted or uniform interpretation of the act neither

the courts nor the public can implicitly rely on any supposed norm of departmental practice. *Chicago, etc., Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99, 100.

No serious inconvenience need be apprehended from a refusal of the courts to follow a dubious practice to the extreme limit to which it was here unwarrantably carried; for in previous cases of this sort, wherever corporate action was taken pursuant to the governing State statutes by the parties to a proposed unification, if in any instance the Commission's approval thereof in advance of the final adoption of its plan should hereafter be held to have overstepped the limitations of its power under Section 5 (2), such union, being at the time still within the competency of the States (*Snyder* v. *N. Y., Chicago & St. L. R. Co.*, 276 U. S. 578, aff'g 118 Ohio St. 72), might be upheld despite the vain looking to said Section 5 (2) by both the Commission and the applicant; inasmuch as the attendant revision of financial structure would have been independently sanctioned under Section 20-a. But if the final step in any such ultra-unification of carriers were found incompatible with both State and Federal laws, such carriers would of course be relegated to their former status. And now that the Commission's general plan of consolidations has been adopted, there should be an end of attempts to use Section 5 (2) or Section 1 (18) as a shunpike.

It is confidently submitted that by both the plain purpose and the very letter of this enactment when applied to the unique situation presented by these leases—pursuant to the terms of which it is within the power of lessee during the term to convert every part of the property demised and be finally holden only for the price obtained for it—and when taken together with all the above-discussed features attending the transaction as approved by the Commission's orders, this "unification" of carriers must be distinguished and condemned as an acquisition of control which is not only without any properly governing precedent but, for this once at least, overleaps the expressed limitation of the power delegated by Section 5 (2) because of "involving the consolidation of such carriers into a single system for ownership and operation."

POINT III.

The Commission exceeded its lawfully delegated power in authorizing the New York Central Railroad Company to acquire control under lease of carriers whose main lines, together with sundry branches, are parallel and naturally competing with those of the lessee, so that competition between such lines will be suppressed and existing routes and channels of trade and commerce will be deflected; and it acted both arbitrarily and beyond its powers in finding such acquisition of control to be in the public interest.

Jurisdiction of the Commission to make an approving order under Section 5 (2) hinges upon its finding first that the proposed acquisition of control will be "in the public interest." *Wichita R. R. & Light Co.* v. *Pub. Util. Comm.*, 260 U. S. 48, 58; *Beaumont, Sour Lake & W. Co.* v. *United States*, 282 U. S. 74, 86. The act itself, however, prescribes no definite standard nor any intelligible principle to which the Commission is directed to conform; and the report cites none (R. 83-84, 47-51, 90; and *cf.* especially *Clinchfield Ry. Lease*, 90 I. C. C. 113, 121). To leave this essentially legislative concept to the determination and discretion of the Commission is an unconstitutional delegation by Congress of its legislative power. *Hampton, Jr. & Co.* v. *United States*, 276 U. S. 394, 409. The assumed power and authority to make these orders being thus without a valid footing (*U. S. Const.*, Art. I, Sec. 1), the orders themselves will be held void.

Although the act leaves indeterminate what may be deemed to be "in the public interest" under Section 5 (2), those features must certainly be deemed to be against public interest which Congress by Section 5 (4) has prohibited in railroad consolidations, viz., every unnecessary suppression of competition and every avoidable diversion of existing traffic routes. But the things which the statute thus brands as

against the public interest are precisely the ends which in the same asserted interest this acquisition of control purports to achieve (R. 48, 49, 89-90, 93). Under color of the power and duty to determine whether or not this proposal is in the public interest, the Commission's affirmative finding (R. 83-84) as particularized in its report (R. 35-39, 48-49) runs squarely counter to the most obvious test the act affords. And this, too, requires the setting aside of these orders.

It will of course be noted that the above-cited provision of Section 5 (4) stands in apparent opposition to that of paragraph (8) which relieves the carriers affected by orders under earlier provisions of the section "from the operation of the 'anti-trust laws.'" In the face of this dilemma which looks to both the preserving and the relinquishing of competition, the only escape from repugnancy fatal to the whole section (*Rice.* v. *Minn. & N. W. R. Co.*, 66 U. S. 358, 378-379) lies in so restricting the scope of the latter paragraph that if any valid order of the Commission under a preceding provision of Section 5 interrupts competition in minor particulars that cannot be obviated—which is the most that any such order can lawfully do in view of the limitation in paragraph (4)—then paragraph (8) will operate to relieve the carriers concerned from the resulting incidental or technical breaches of the anti-trust laws.

Accruing thus automatically, such immunity may be conceived to proceed directly from the will of Congress. But without such restriction of the scope of paragraph (8), it must proceed from the Commission's discretion—under an inadmissible, as well as a repugnant, delegation by Congress of its legislative power—to be exercised in the weighing of whatsoever the former may deem pertinent to the public interest over against such specification thereof as Congress has embodied in the anti-trust laws. In the nature of things probably no plan "for the consolidation of the railway properties of the continental United States into a limited number of systems" could, without some such breaches at once preserve competition and also meet every other requirement of Section 5(4). But in testing the lawfulness of this proceed-

ing under Section 5(2), which was decided by the Commission before it had adopted its nation-wide plan, it cannot be overlooked that there is nothing inherent in the nature of an isolated and lawful acquisition of control to preclude the preservation of competition and of existing traffic routes, save in occasional and negligible details.

Thus in the situation here presented, paragraph (8) could not empower the Commission—or remove the prohibitive limitation imposed by paragraph (4) in restraint of its power—to make the favorable finding and orders in the present case, where the competitive relationship between lessors' and lessee's trunk lines, together with that of numerous interconnecting branches, stands out as the main inducement of the proposed acquisition of control and the principal ground of its accepted claim to be "in the public interest" as affording advantageous choices of alternative routes (R. 48-49), though this very feature contravenes that canon of the public interest afforded by the requirement of paragraph (4) that "competition shall be preserved as fully as possible, and wherever practicable the existing routes and channels of trade and commerce shall be maintained." *Chesapeake & O. R. Co.* v. *United States,* 283 U. S. 35, 45.

The District Court uncritically disposed of this whole subject by observing (R. 191) that "the Commission merely determines applications for acquisition of control under Section 5 (2) in the light of the public interest, and Congress thereupon attaches the exemption of the statute expressed in Section 5(8)"; and by further pointing out (R. 192) as against the asserted vagueness of the expression "in the public interest," that "standards no more precise than that films be found 'moral, educational, or amusing and harmless' "; or "that imported teas be pure"; or "requiring a finding of foreign discrimination"; or "that an alien is an 'undesirable resident' " have "all been sustained as against a similar contention of invalidity."

But except in the last instance—where the Court found that a separate statutory standard existed and was applicable—not one of these examples affords an adequate parallel.

In all of them the challenged words have a well-understood meaning and an ascertainable scope according to prevailing standards. This is not true of the "public interest," any more than of, *e. g.*, the general welfare. Only Congress itself can tell what it intended that phrase to signify or to include. Thus if it is in the public interest to preserve competition as far as possible, then it is not in the public interest to do away with that obstacle to monopolistic unifications of carriers by orders that must look to the suspending of the anti-trust laws to give them validity. In such case it is not Congress but the Commission that repeals *pro tanto* a penal statute.

Because the Commission was not qualified, for lack of a sufficient legislative or generally understood standard, to make the jurisdictional finding of public interest on which its orders herein are based; and also because in making such finding and orders it exceeded its constitutional and statutory power as limited not only by anti-trust laws but by the requirement of Section 5 (4) of the Transportation Act for the preservation of competition and existing traffic routes; and as further restricted by Article I, Section 1 of the Constitution, defining the seat of legislative power—for each and all of these reasons the said orders, it is submitted, must be set aside.

POINT IV.

As exertions of corporate power by the carriers concerned, the proposed leases are not within the sanction of the controlling statute of the State of Ohio; and as combinations of competing lines, they contravene constitutional or statutory limitations of corporate power to enter into such leases in every State they touch; so that on either ground the Commission was without power to approve and authorize them.

A common carrier by railroad cannot lease its line to another without a statutory grant of power to do so; nor can a carrier take such lease from another carrier without

being so empowered. *Thomas* v. *W. Jersey R. Co.*, 101 U. S. 71; *Pa. R. R.* v. *St. L., Alton & Terre Haute R. R.*, 118 U. S. 290, 309; *Oregon Ry.* v. *Oregonian Ry.*, 130 U. S. 1; *St. L., Vandalia & Terre Haute R. Co.* v. *Terre Haute & Ind. R.*, 145 U. S. 393.

Although the carriers that are parties to these leases are engaged in large part in interstate commerce, yet as corporations they are creatures of the States, so that the sources of the grants and limitations of their corporate powers (*e. g.*, to lease, or purchase, or consolidate with, others' lines) lie in the constitutions and statutes of the States in which they are chartered or operated (*Louisville & N. R. Co.* v. *Ky.*, 161 U. S. 677, 702-703) save when such laws are superseded under the commerce power of Congress by a Federal statute exclusively occupying the same field; *i. e.*, covering the same subject in such measure as to exclude action by the State which otherwise would be clearly within the latter's province. *Simpson* v. *Sheppard* (*Minn. Rate Case*), 230 U. S. 352, 417.

As such power then "is derivable from the State, the State may accompany it with such limitations as it may choose to impose" (*L. & N. R. Co.* v. *Ky., supra,* at p. 703), and "it has also been held that the state has the power to forbid the consolidation of state railroad corporations with competing lines, although both may be interstate carriers, and the prohibition may have a far-reaching effect on interstate commerce." *Minn. Rate Case, supra,* at p. 410.

The Ohio Incorporated Companies Act of 1852, as amended in 1873 by 70 Ohio Laws 129, Section 24 of the division entitled "To create and regulate railroad companies," contained the following grant and limitations of power, namely, that "any railroad company organized in pursuance of law may lease or purchase any part or all of any railroad constructed by any other company, if said companies' lines of said road are continuous or connected, and not competing, as aforesaid, upon such terms and conditions as may be agreed upon between said companies respectively, or any two or more railroad companies whose lines are so connected, and not competing, may enter into any arrangement

for their common benefit, consistent with and calculated to promote the objects for which they were created; provided, that no such aid shall be furnished, nor any purchase, lease or arrangement perfected until a meeting of the stockholders of each of said companies shall have been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such time and place and in such manner as is provided for the annual meetings of said companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, shall have at said meeting assented thereto; and provided, that in case of the lease of any railroad situate in whole or in part within this state, the rental reserved and secured for said leased road shall be equal at least to the net earnings of such leased road for the fiscal year next preceding the one in which said lease is made."

On the provisions above quoted from the single sentence in which they were originally embodied nearly sixty years ago the power of railroads to enter into leases of lines lying wholly or partly in Ohio has ever since depended. To-day in practically identical language, the same statute, having meanwhile passed through two codifications (Revised Statutes of 1880, Sections 3300 and 3301; General Code of 1910, Sections 8806 and 8809 inclusive) remains in force in its entirety as separately numbered sections of the present General Code. The limitations in regard to competing lines and minimum rental are now contained in Sections 8807 and 8809 (see Appendix, p. [i]) and their being thus split up is held to work no change whatsoever in the meaning or application of the original statute. *Cf. State, ex rel., etc.* v. *Bushnell, et al., etc.*, 95 Ohio State 203, syl. 2; *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205, 213; *United States* v. *Ryan*, 284 U. S. 167, 174-175; *McDonald* v. *Hovey*, 110 U. S. 619, 629; *Anderson* v. *Pacific S. S. Co.*, 225 U. S. 187, 213; *United States* v. *Sischo*, 262 U. S. 165, 168-169.

And the courts have construed this statute as it was dissected in the first codification (Rev. Stats., Secs. 3300, 3301) to embody not only the grant but also the inseparable

limitations of the corporate power of railroad companies to enter into leases or other agreements between themselves in respect to their lines of road. *Mannington* v. *Hocking Valley Ry. Co.*, 183 Fed. 133, 150-151; *Central Trust Co.* v. *Wheeling & Lake Erie R. R. Co.*, 211 Fed. 515, 525-526, and cases cited; *State ex rel. Atty. Gen.* v. *Cleve. & Pitts. R. R. Co.*, 13 Ohio C. C. (N. S.) 145; *State* v. *Vanderbilt*, 37 Ohio St. 590, 640, and *cf. Bank of the U. S.* v. *Dandridge*, 25 U. S. 64.

In 1883 (80 Ohio Laws 116; Rev. Stats. of 1880, Sec. 3305; now Gen. Code, Sec. 8813) the further limitation was added that no such lease shall be made "unless the lessor receives full and adequate security for the payment of the rental and for the preservation of the property in as good condition as on entering into possession thereof."

Combinations between competing lines, whether effected by lease or otherwise, are further prohibited by express constitutional or statutory provisions in every State in which the lines of one or both lessors herein are parallel or competing with those of the lessee or of each other. Gen. Code of Ohio, Sec. 9027; Mich. Const., Art. XII, Sec. 8; Mich. Compiled Laws, Chap. 159, pars. 8263, 8435; Sec. 1; Ind. Acts of 1913, p. 462; Ill. Const., Art. XI, Sec. 11; Ill. Stats., Chap. 114, par. 36; *cf. E. St. L. Connecting Ry.* v. *Jarvis*, 92 Fed. 735; cited in *Borg* v. *Ill. Term. Co.*, 16 Fed. (2d) 988, 989 (*supra*), and *People* v. *People's Gas Light Co.*, 205 Ill. 482, 492 (cited *supra*). The word "purchase" in these provisions of the Illinois Constitution and laws includes every mode of acquiring title other than by descent. *Chicago & E. I. R. Co.* v. *Doyle*, 256 Ill. 514.

Some of these provisions are immediately associated with grants of corporate power to enter into railroad leases and other inter-corporate relations; but no regulation of the whole subject is anywhere more explicit concerning the leasing of competing carriers, or the protection of minority interests against inadequate rentals and the exploiting of leased roads, or more careful to affix these safeguards to the grants of corporate power as limitations thereon, than

that of the Ohio statutes above cited. Thus of the effect of Section 22 of the original Ohio Incorporated Companies Act on the right of consolidation—and the same under Section 24 is true of leases—by interstate carriers of their lines in that State, this Court has reiterated that the "power of corporations of other states to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes and thus avail of the rights given thereby, is as completely dependent on the will of that state as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws." *Kansas City, M. & B. R. Co.* v. *Stiles,* 242 U. S. 111, 117, quoting from *Ashley* v. *Ryan,* 153 U. S. 436, 442.

However else the Transportation Law may have qualified the corporate capacity or the States' jurisdiction of such carriers, and whether or not Section 5 (2) makes their resort to the Commission mandatory for its approval of any proposed acquisition of control by lease, they still derive from the States their corporate power, and the mode prescribed for exercising it, to enter into leases; and in Ohio the above-quoted limitations of such power are inseparable from the grant. Section 5 (2) prescribes no internal corporate proceedings for the making of such demise, but leaves the carriers in this respect where it finds them, namely, subject to the corporation codes of the States where they are chartered or do business. The provisions, for example, of the Ohio statute requiring thirty days' notice of the several corporate meetings and a two-thirds' vote of the stock of each company had to be and were duly observed in this case.

The orders herein complained of contravene the Ohio statute—and under the first of the following specifications the cited laws of other States as well—in approving and authorizing the New York Central's acquisition of control, *ultra vires,* (a) by leases of competing lines, (b) for a rental less in each case than the net earnings of the leased road for the fiscal year next preceding, and (c) without security for payment of the rental and preservation of the property.

In these particulars Section 5 of the Transportation Law does not allow relief to carriers from the original and inherent limitations of their corporate powers in the premises nor purport independently to grant such powers or to define any mode of exercising them.

Section 5 (2) provides that "the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found just and reasonable"; and by Section 5 (8) that the "carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order are relieved from the operation of the 'anti-trust laws,' as designated in section 12 of Title 15, Commerce and Trade, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section."

These provisions carry, not a grant of corporate power, but a dispensation from "restraints and prohibitions." The Ohio statute here considered is not a restraint or prohibition. But for it the railroads would be powerless to make any lease. The Ohio statute is an enabling, not a restraining, act. It authorizes only such a lease as provides at least the minimum rental prescribed, and also adequate security for the payment of the rental and the preservation of the leased property. And the expression, "all other restraints or prohibitions by law," construed in its relation to the context under the *ejusdem generis* rule, signifies restraints and prohibitions of the same general character as the anti-trust laws. See *Alabama* v. *Montague,* 117 U. S. 602, 610. Had Congress meant more than this, it knew well how to say so; *e. g.,* in the concluding clause of paragraph (6) of this same section.

If the requirement of the Ohio statute as to rental were a "restraint or prohibition" against which the order of the Commission conferred relief, then so also would be the pro-

vision of the same section (Gen. Code, Sec. 8809) requiring the consent of two-thirds of the stockholders; though the latter is conceded on all hands to be a prerequisite to any valid lease, and its observance, being deemed necessary in this transaction, was not omitted. The Commission's report declares that (R. 155; *cf.* 76, 152-154), "Whether or not the New York Central, the Michigan Central and the Big Four have corporate capacity under the Ohio statutes to execute the proposed leases is dependent upon construction of those statutes. Pending such construction by a court of competent authority, we feel that we may accept the opinion of applicant's counsel."

The District Court held that (R. 197), "Though in the original statute (70 Ohio Laws 129, Section 24) the restraint was in the form of a proviso on the power to lease, the code now in force deals with the minimum rental in a separate section"; and concluded (R. 198), "We consider the corporate power unaffected by the limitation thereon." This view, as we have seen, is clearly unsound. But the Court also said that under Section 5 (2) "the attack based upon the state law limitations of the corporate power has no place in the suit to annul the order." This, too, is a misconception. See "Jurisdiction of the District Court," *supra*, p. 23. It need only be added that in *Cleveland, C., C. & St. L. Ry. Co.* v. *Jackson*, 22 Fed. (2d) 509, 511 (cited *supra*), the Sixth Circuit C. C. A. held that, in this case then pending before the Commission, that body had power and was required to consider the rights of minority stockholders, including those based on State statutes, and that its determination is subject to judicial review by suit like this to set aside its orders prejudicial to those interests.

So also a plenary suit brought by a minority stockholder in a State court and removed by defendant to the District Court, wherein it was sought to enjoin a carrier from unlawfully lending its credit to other carriers by means of a joint and several equipment trust entered into in 1922 by the same railroads that are defendants here, such transaction being charged to be contrary to State laws and incapable of valida-

tion by Transportation Law, Section 20-a, was there dismissed for want of jurisdiction because it was not brought under the Urgent Deficiencies Act and was in legal effect an action to enjoin the enforcement of an order of the Commission. And this Court affirmed the dismissal. *Venner* v. *Mich. Cen. R. R. Co.*, 271 U. S. 127; *cf. So. Pac. Co.* v. *City of Willow Glen*, 49 Fed. (2d) 1005, 1008.

The conclusion is inevitable that in a minority stockholders' suit begun in the District Court under the Urgent Deficiencies Act to set aside an order of the Commission under Section 5 (2) upon the ground that such order denies him equal treatment or will unlawfully injure his pecuniary interest as an investor, the plaintiff may litigate every question pertinent to such claim as in a plenary suit in equity; for otherwise he would no longer have a remedy to prevent threatened damage to himself from unconscionable or *ultra vires* acts by his own corporation in the carrying out of permissive orders of the Commission; or else such orders would be subject to defeat in suits for injunction to which the Commission is not made a party.

POINT V.

The lease of the Michigan Central was not duly authorized, having been voted by its majority stockholder contrary to the latter's express covenant with bondholders for whose security such stock is pledged, and also in breach of said majority stockholder's fiduciary duty to the minority to keep and observe said covenant; and in these circumstances the Commission's refusal to pass upon said question, and its finding that acquisition of control through such lease will be in the public interest, were unreasonable, arbitrary and unauthorized by Section 5 (2).

The "Three and One-half Per Cent. New York Central-Michigan Central Collateral Trust Indenture" (I. C. C. Rec., F. D. No. 5690, Ex. 47), under which all of the Michigan

Central majority stock is pledged to secure the bonds covered thereby, provides in Article 3, Section 2, that unless expressly authorized by the holders of 75 per cent. in amount of such bonds, neither the railroad nor the trustee shall vote for, but on the contrary shall oppose "any consolidation of the Michigan Company with any other railway or transportation company"; but the pledge shall not prevent (Sec. 5) "the consolidation or merger of the Michigan Company with, or the sale, conveyance or transfer of its property to the Railroad Company" (now the New York Central) "upon such terms as shall be approved by the holders of seventy-five per cent." as aforesaid; and again, "But no merger, consolidation or lease shall be made or permitted as in this section authorized, unless and until the Railroad Company shall first * * *."

That the term "consolidation" in the former section is used in a comprehensive sense is indicated by the qualifying words, "either by purchase of stock or otherwise"; and the latter section in the same connection further particularizes it by using the terms "consolidation," "merger," "sale, conveyance or transfer," and "lease."

These provisions were intended to secure the bondholders against any such change in the ownership or operation of the Michigan Central as this acquisition of control by lease involves, unless the change should so commend itself as to receive the prescribed 75 per cent. consent. No attempt was made to obtain such consent, but the majority stock of the Michigan Central was voted for the lease, and the acquisition of control by lease has been accomplished in total disregard of said covenant (R. 18-20, 27, 82, 111-112, 119-200).

The bondholders could, of course, successfully contest the lease; and, should interest prompt them, they may be expected to do so. In such case the Michigan Central minority stockholders must suffer from a belated and forcible disruption of the unified properties after their own company's separate identity, organization and good will shall have been lost by disuse and lapse of time. So the majority stockholder's voting of the lease violated also its fiduciary duty

to the minority—a breach then enjoinable at their suit were the matter not one within the Commisison's purview. *Cf. Cleve., C. C. & St. L. Ry. Co.* v. *Jackson,* 22 Fed. (2d) 509; *Venner* v. *Mich. Cen. R. R., supra.* The consideration of the public interest, enjoined upon the Commission by Section 5 (2), requires that the interests of the stockholders be considered and protected; and the hazard of loss to them from thus exposing the lease to attack should have stayed its hand or have caused it to condition its order of approval upon the procuring of the required consent. The New York Central as applicant before that body should have approached it with clean hands. The approval and authorization there sought need not have been granted inasmuch as there was nothing therein from the standpoint of the public to demand the making of the lease. No matter how slight or remote this danger might appear to the Commission no urgency of public interest was present to hinder it from requiring the applicant to correct this defect in its proposal. The Commission, however, held upon this point that (R. 82), "The question presented is one which we cannot undertake to decide." The District Court erroneously held that (R. 200), "plaintiff is not a party in interest under the agreement," and that "The danger of subsequent action by the bondholders is too remote." But without the requisite consent of bondholders and for want of any conditioning provision therefor either in the Michigan Central lease or in the Commission's order approving the same, such order and the jurisdictional findings in support thereof are arbitrary, unreasonable and a misapplication of Section 5 (2).

POINT VI.

The dividend-rentals stipulated in either lease are, as matter of law, inadequate and unreasonable; and the finding of the Commission, that the consideration, terms and conditions of the leases are just and reasonable, is unsupported by and contrary to the evidence and is an arbitrary and confiscatory act.

The dividend-rental of $50 per share per annum on the Michigan Central stock is almost exactly one-half its average annual net income for the five years 1925 to 1929, inclusive. It is less than 2¼ per cent. of the fair valuation of that company's properties according to its own showing in valuation proceeding before the Commission. The dividend-rental of $10 per share per annum on the common stock of the Big Four is less than half its average annual net income for the same years; and it is less than 2 per cent. of the fair valuation of its properties as similarly shown.

For this the New York Central receives all of the net earnings of the two roads during the ninety-nine-year term of the leases. The lessees get nothing more, either in money or in property; any betterments are at the expense of the respective lessors. The possibility of any surplus accumulating during that period is absolutely barred. No undivided earnings will be plowed in for the reaping of a subsequent harvest by the stockholders. The lessee also gets the use of all the cash and current assets of the lessors, without interest; this includes the surplus of the Michigan Central of about one hundred and one-half millions, over five times the amount of its capital stock. In addition, the lessee will get the savings which it expects to realize through the economies to be effected as a result of the acquisition.

The New York Central as majority stockholder gains in the one capacity what it loses in the other. Not so of the lessors' minority stockholders. What they lose the lessee gains. When the New York Central leased the Boston &

Albany the rental fixed was substantially equal to the entire net income of the lessor. The lease was made in 1900, at a rental of 8 per cent. upon the stock of the lessor. The earnings of the lessor upon its common stock, prior to the lease, had been (I. C. C. Rec., F. D. No. 5690; Harris, pp. 404-406): 1900, 8.07 per cent.; 1899, 8.12 per cent.; 1898, 8.12 per cent.; 1897, 8.16 per cent.; 1896, 8.07 per cent.; 1894, 8.03 per cent.; 1893, 8.12 per cent.; 1892, 8.03 per cent.

The cross-examination of President Patrick E. Crowley by Mr. Elihu Root, Jr., as counsel for the Big Four stockholders' committee, and of the same witness and also of Vice-President A. H. Harris, chairman of the New York Central's finance committee, on behalf of the Michigan Central's stockholders, is brief and illuminating and should be read by this Court (R. 218-221). It discloses that other railroads might have offered better terms and that the New York Central would not have accepted twice the stipulated rental and let the leases go elsewhere. It shows also that the leased properties had a peculiar value to the lessee, but that these officers thought it no part of their duty in the fiduciary relation of the New York Central as majority stockholder to make any inquiry for better terms or to make as good a bargain for the minority stockholders as they would have insisted upon for the dominant party in like circumstances.

The Court is urged to bear in mind that this transaction is entirely a voluntary proposal by the New York Central. Of course, the public interest does not require that these properties be leased at all. Neither Congress nor the Commission has commanded it. The New York Central was under no compulsion of law or equity to enter into the leases. As a fiduciary, the lessee was not even permitted, on familiar principles of law and equity, to enter into the leases at all except upon the very best terms obtainable from any other lessee, nor for any less than the utmost it would itself be willing to pay rather than that another should become the lessee.

Perhaps (though it is not admitted) such terms would exceed what the public interest would permit. If so, the leases could not be voluntarily consummated. Both conditions must be satisfied, so long as such transactions are on a voluntary basis and are not compelled by statute, with a scrupulous discharge of the fiduciary duty as well as a scrupulous preservation of the public interest. Not only must the terms and conditions lawfully prescribed by the Commission in behalf of the public be observed, but also the rights in law and equity of the *cestui que trust.* No doubt the public interest is relatively the more important; but it can never be made exclusive. At any rate, it need not now be inquired whether Congress could make the public interest the sole criterion, if compulsory acquisition of control by lease were made the subject of Federal legislation. The order authorizing and approving these leases does not necessitate their being entered into.

On the issue of "public interest," inadequacy of rental may be of little relevancy unless it be gross enough to be "arbitrary and confiscatory." On the issue of "breach of trust" the slightest inadequacy, the fixing of any rate of rental less than the maximum obtainable, is not only relevant, but is sufficient in equity to set aside the transaction.

This Court will decide whether the Commission's order was rendered without any evidence to support it or is incompatible with the evidence (*Florida E. C. R. Co.* v. *United States,* 234 U. S. 167, 185; *Chestnut Ridge Ry. Co.* v. *United States,* 248 Fed. 791, 802), or is arbitrary, confiscatory or unreasonable (*I. C. C.* v. *U. P. R. R.,* 222 U. S. 547, cited *supra*). Although the Commission finds the acquisition to be in the public interest, "it may not approve the lease unless it further finds the consideration, terms and conditions thereof are just and reasonable—just as to the lessor, the lessee, and necessarily to the stockholders of each." *Cleve., C. C. & St. L. Ry. Co.* v. *Jackson,* 22 Fed. (2d) 509, 510-511, cited *supra.*

As majority stockholder in both the Big Four and the Michigan Central, the New York Central stood in the rela-

tion of trustee to the minority stockholders, and its fiduciary duty forbade the taking of any advantage whatever. As such fiduciary, the lessee, as already remarked, was not even authorized to enter into these leases at all except upon the very best terms obtainable from any other lessee, nor for any less than the utmost it would itself be willing to pay rather than that another should become the lessee. *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 595-596, 598, 599; *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 487-488; *Jackson* v. *Ludeling*, 21 Wall. 616, 625; *Wheeler* v. *Abilene Nat. Bank Bldg. Co.*, 159 Fed. 391, 393-394; *Jones* v. *Missouri-Edison Electric Co.*, 144 Fed. 765 (C. C. A., 8th Circ.); certiorari denied, 229 U. S. 615; *Ervin* v. *Oregon Ry. & Nav. Co.*, 27 Fed. 625, 631; *Kavanaugh* v. *Kavanaugh Knitting Co.*, 226 N. Y. 185, 195-196; *Farmers Loan & T. Co.* v. *N. Y. & N. R. Co.*, 150 N. Y. 410, 430, 431; cited to this point in *Boyd* v. *New York & H. R. R. R. Co.*, 220 F. 174, 181; *Hyams* v. *Calumet & Hecla Mining Co.* (C. C. A., 6th Circ.), 221 Fed. 529, 537.

In the *Farmers Loan & Trust Case, supra,* it is said (p. 945) that "where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for that majority to manage the affairs of the first corporation for the benefit of the second." And in the *Geddes Case, supra,* the opinion declares that (p. 599) "transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged, the burden is upon those who would maintain them to show their entire fairness." *Cf. Pa. Canal Co.* v. *Brown*, 235 Fed. 669, syl. 3 (C. C. A., 3rd Circ.).

Yet the District Court held in the case at bar (R. 194) that "The public interest is the paramount consideration, and, although the interests of stockholders must not be ignored" (citing *Cleve., C. C. & St. L.* v. *Jackson, supra*), "the plaintiff has in our judgment failed to prove its claim of gross inadequacy."

This is clearly erroneous, not only in its allocation of the burden of proof and in its intimation—in face of the relations of the parties—that no inadequacy of consideration which is not "gross" will suffice for the relief demanded, but also in finding that public interest in any wise condones the breach of fiduciary duty owed by this volunteer lessee. The truth is rather that so long as such transactions are not compelled by statute they cannot be authorized without a fulfillment of the fiduciary duty as well as conformity with the public interest. The Commission's report (R. 82) and the District Court's opinion (R. 194) both refer to the provisions of the leases (Art. III) for the purchase by lessee of minority stock in the lessor companies at a valuation determinable by arbitrators, which "appear to furnish adequate means for equitable adjustment of grievances of dissatisfied minority stockholders." But aside from the oppressiveness of the offered alternative, namely, that of either accepting the fixed rental-dividend of only half the (1925-1929) average annual net earnings per share, or else of selling such stock at a price fixed by arbitration, the option itself is illusory, for the arbitration provision had already expired by its own express limitation pending the present suit to test the lawfulness of the Commission's orders and before the said opinion of the District Court was rendered. And this again—an unduly short limitation—is incompatible with the Commission's finding that the consideration, terms and conditions of the leases are just and reasonable.

Probably no skill in selecting and correlating general railroad and stock market statistics, nor any rule for estimating investment values from comparisons of the ratios or proportions of the four classes of data—net earnings, dividends declared, market quotations (seldom or never available for lessors' stock), and equities per share—by collating the lessors' data with the same for other major carriers, could have wholly prevented or greatly lessened the sharp variance of results, as between the Big Four and the Michigan Central, reached by the expert figuring (R. 82, 194) offered in support of the rental-dividends proposed for the minority

stockholders of those companies respectively. Reliable or consistent conclusions can never thus be reached. But the acceptance of such rule-of-thumb and tipster methods by the Commission and by the District Court, and their casual comments thereon, must appear to those investors—and to this Court—like inconsiderate trifling with their interests. For example (R. 82), "The differences in the ratios, as between the Big Four and the Michigan Central, would seem to give effect in some measure to the history of the carriers as to earnings." And again (R. 194), "Although the average net earnings exceed the rentals guaranteed, the latter cannot be held inadequate, for accumulation of surplus is essential in railroad financing."

If a surplus to be built up out of future undistributed net earnings were to be expended for betterments which lessors would ultimately get back, their stockholders' forbearance would receive only partial compensation since the use of their money in the interim would be without interest. But inasmuch as the lessors are charged by the lessee with the cost of all future betterments, what possible justification is there for withholding from them permanently half the net earnings, the whole of which have hitherto enured to them either in dividends or in surplus profitably employed?

In these circumstances it is submitted that the consideration, terms and conditions of the leases are not just and reasonable; that they are unjust to the stockholders of the lessor corporations; that they constitute a breach of fiduciary duty owed by the lessee to said stockholders; that the dividend-rentals are wholly incommensurate with the demonstrated earning powers and with the property valuations of the respective lessor railroads; that the imposition upon their stockholders of such fixed and inflexible rental-dividends is confiscatory; and that the findings of the Commission in respect to the consideration, terms and conditions of the proposed leases is without evidence, incompatible with the conceded facts, and is both arbitrary and unreasonable, transcending the Commission's power and authority.

POINT VII.

The Commission was without power to condition its authorization upon the acquisition of the burdensome short lines, for which the New York Central and Big Four had not applied, and to which they objected and protested; and the orders embodying and enforcing such condition are also arbitrary and confiscatory as to this appellant.

The applications made to the Commission by the New York Central and the Big Four related merely to the leasing of properties which were already a part of the New York Central system; they did not involve the building up of an enlarged system. The New York Central did not apply for authority to acquire any of the short lines; it opposed those interventions. The short lines have been operated at a loss. To acquire and operate them would impose a heavy financial burden upon the New York Central and its stockholders, and would sensibly impair its ability to earn and pay the unsecured rental-dividends to the lessor companies' stockholders. The condition was coercive and confiscatory.

There was also no power in the Commission to impose this condition in proceedings under Section 5 (2). Paragraphs (4) to (6) afford the sole source of such power. Approval of a proposed consolidation under the nation-wide plan may be conditioned upon its being made more inclusive to conform with such plan. But the plan had not yet been promulgated. The Commission's authority under Section 5 (2) is to "approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." All these expressions, "consideration," "rules and regulations," and "terms and conditions," have reference to one and the same subject-matter, "such acquisition"; that is to say, the acquisition for which approval and authorization are sought. Such was in

substance the position taken by the New York Central before the Commission in resisting the interventions of the short lines; and we deem it unanswerable.

Acquisition of control by lease or otherwise must not involve a consolidation. No consolidation could be approved by the Commission before the adoption of its ultimate plan. Then any consolidation must of course take in the tributary weak lines in order to be "in harmony with and in furtherance of the complete plan." The Act nowhere confers on the Commission any authority to anticipate the complete plan by compelling a proposed lessee to acquire burdensome short lines, not applied for or wanted, as a condition precedent to the granting of its authority for the leasing of roads described in the applicant's petition.

> "Admittedly each part of the order must be authorized by the statute, or not at all. Obviously the terms and conditions of its order must be germane to the subject-matter, and fairly within the powers expressly delegated. The Commission as a statutory body cannot under the guise of administering this or any other provision of the law draw to itself any powers not conferred upon it by the act.
>
> The Commission is a body of limited jurisdiction. It may not directly exercise power, grant of which has been withheld by Congress (citations). Owing its existence and its power to statutory enactment, it may not, by conditions subsequent attached to its approval, force a party before it to impound with its funds which do not enter into the issuance of securities, the consideration for which it finds to be adequate. Its power to regulate cannot be so exercised as to advance any policy which does not have its origin in the statute." *Chicago, M., St. P. & P. R. Co.* v. *United States*, 33 Fed. (2d) 582, 587; aff'd *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311.

In *Interstate Commerce Commission* v. *United States*, 280 U. S. 52, it was held that the Commission had no power to require interstate carriers to abandon their existing stations and terminal tracks in a city and to combine for the purpose

of establishing in lieu thereof a new union station at a new site. In the course of the opinion, the late Chief Justice Taft said:

> "If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act."
>
> *Cf. Oregon-Washington R. R. & Nav. Co.* v. *United States,* 47 Fed. (2d) 250.

It is submitted that it was beyond the power of the Commission to require the acquisition of the short lines as a condition of its approval of the acquisition sought, and that its orders embodying and enforcing said condition are, although the applicants protestingly submitted thereto, arbitrary and confiscatory as to this appellant. For the case is not one where the corporation in its lawful voluntary acts is presumed to represent its stockholders, but is one rather where the latter have a separate and direct investor's interest in burdens which the Commission by its unauthorized orders imposes upon their corporation *in invitum.* And the same is of course true of appellant's right and interest (arising, in respect to the rental-dividends and their security, out of the same proceeding) in its capacity of a stockholder in each of the lessor corporations and, as such, an involuntary creditor of the New York Central. No opportunity to reconsider the leases has been afforded to the stockholders of any party thereto since the lessee became thus overburdened.

POINT VIII.

The leases not being authorized by the Ohio statute, but being in violation thereof, the assumption of obligation and liability thereunder was not for a lawful object within the corporate purposes of the New York Central, and the Commission was without power to authorize such assumption.

The assumption of obligations is governed by Section 20a (2), which in part provides: "The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes * * *." Paragraph (7) provides in part, "a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than is specified herein."

This language is in significant contrast with that of Section 5 (6) (c), which provides that a consolidation, when approved and authorized by the Commission, may be effected, "the law of any State or the decision or order of any State authority to the contrary notwithstanding." A like provision is employed verbatim in Section 13 (4) relative to the correlating of rates, etc., "in intrastate commerce on the one hand and interstate or foreign commerce on the other hand."

Section 20a does not however assume to override State corporation laws, but merely to supplant the supervisory jurisdiction of State commissions by that of the Interstate Commerce Commission and to substitute for multiple and conflicting regulation by local public utility and blue sky authorities the exclusive and plenary jurisdiction of a single Federal tribunal as paragraph (7) provides. The source of a railroad's corporate power in the premises is still to be found in the statutes of the State or States where it is incorporated or operated. That was true when it had to apply for approval to State commissions at every step of its financing. Only a clearly expressed intent of Congress, certainly

not to be read into Section 20a, would warrant the inference of a change in this respect. It is only where the language admits of no doubt, as in the contrasting phraseology above quoted, that the Commission may be deemed qualified to supersede the corporate powers which were derived by railroads from the States with new ones of its own originating.

The Transportation Act was drafted under jealous surveillance, so that every word and phrase was scrutinized from all angles and by every interest; and when new or changed corporate powers by railroads were in contemplation by all concerned or despite opposition, as in the cases referred to of consolidations and intrastate rates, the language employed was apt and conclusive. Such superseding of State enabling acts is not the express intent of Section 20a. Only by implication can such intendment be elicited. But by collating kindred clauses throughout the Act it becomes apparent that mere implication cannot suffice. The will of Congress, moreover, needs to be most explicitly pronounced to overthrow the inveterate tradition voiced by this Court in *Louisville & N. R. Co.* v. *Kentucky,* 161 U. S. 677, 702, cited *supra,* that "In the division of authority with respect to interstate railways, Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

Section 20a has then but two objectives, both express; namely, to dispense with the consents of State commissions and officials, and to require the approval of the Interstate Commerce Commission, for all security issues and other financing commitments by carriers that are subject to its jurisdiction. Paragraph (2) thus provides that "It shall be unlawful for any carrier to issue * * * or to assume any obligation or liability * * * even though permitted by the authority creating the corporation, unless and until, and then only to the extent that * * * the Commission authorizes such issue or assumptions."

In the phrase "even though permitted," etc., the sense obviously is that although the carrier is empowered by the laws of its own State and is given leave by the State's railroad commission to exercise such power by taking the action proposed, it must still obtain the Interstate Commerce Commission's approval before doing so. And paragraph (7) makes "other approval" unnecessary. But there is manifested no legislative intent to permit authorization by the Commission of any railroad financing without pre-existing corporate power in the applicant to do that which the Commission is asked to approve. On the contrary, paragraph (2) prescribes that any issue of securities or assumption of obligation or liability shall be "for some lawful object within its corporate purposes."

It is clearly not for such an object, nor is it within such purposes, as the same are defined and limited by the Ohio statutes providing for the creation and regulation of railroad companies (cited *supra*, Point III), that the New York Central Railroad Company, incorporated and operated in that State and subject to its laws, assumes the obligation and liability to pay to the minority stockholders of the lessor companies, as rent for the leased railroads, which are likewise situate in part in the same State, an amount or rate of rental less than the laws thereof permit and enjoin. The General Code of Ohio, Section 8809 (cited *supra* with the original act), expressly limits the corporate power of railroad companies to make or take such leases, by annexing to the grant of such power the proviso that "the rental reserved and secured for the leased road shall be equal at least to its net earnings for the fiscal year next preceding the one in which the lease is made."

These leases do not meet that statutory requirement and they were not within the corporate powers of the parties thereto. The making of an *ultra vires* and unlawful lease cannot legitimately come within the New York Central's "corporate purposes." The assumption of obligation and liability to pay direct to lessors' stockholders the rental so unlawfully reserved, is not the description of "some lawful

object." The District Court points out that in the progress of the Transportation Act through Congress the word "purposes" was substituted for "powers," and holds, therefore, that "this is not a limitation based upon the charter powers of the corporation." But what change of meaning was actually accomplished by the substitution? In *Wilbur, Secretary of the Interior,* v. *United States ex rel. Vindicator Consol. Gold Mining Co.,* 284 U. S. 231, 237, it is held that where the language and meaning of the statute are clear, it is not permissible to resort to the legislative history as an aid to construction. Can a corporation have purposes outside of its powers? What else is a corporation but a congeries of powers, with a sole or aggregate membership to exercise the same?

The Commission's order includes *pro forma* the jurisdictional finding that the applicant's assumption is for some "lawful object within its corporate purposes"; but, as already noted, the accompanying report referred to by the order recites: "Whether or not the New York Central, the Michigan Central, and the Big Four have corporate capacity under the Ohio statutes to execute the proposed leases is dependent upon construction of the statutes. Pending such construction by a court of competent authority, we feel that we may accept the opinion of applicant's counsel." The Commission's position with respect to the limitations imposed by State legislation on the issuing of railroad securities had already been declared in *Capital Stock of Pittsburgh & W. Va. Ry.,* 82 I. C. C. 704, to be "that in this matter we should be governed by the policy of the State law."

The finding and orders here made by the Commission, Finance Docket No. 7744, *Assumption of Obligation & Liability by New York Central;* F. D. No. 7745, *Assumption of Obligation & Liability by Cleveland, C., C. & St. L. Ry. Co.,* 158 I. C. C. 317, in respect of Michigan Central and Cleveland, C., C. & St. L. Railway, are without evidence of the jurisdictional facts and are contrary to law, and the said orders were unauthorized and beyond the power of the Commission.

CONCLUSION.

The decree of the District Court should be reversed, with directions that each of the orders under consideration be annulled and set aside and the *status quo ante* restored.

It will doubtless appear that since this suit was commenced the leases have been executed. That, however, is no obstacle to the granting of relief herein. The Court, having properly acquired jurisdiction of the subject-matter, will retain jurisdiction for the purpose of granting full relief. *McGowan* v. *Parish,* 237 U. S. 285, 296; *Peirce* v. *New York Dock Co.,* 265 Fed. 148, 158 (C. C. A., 2nd Cir.); *Moore* v. *New York Cotton Exchange,* 296 Fed. 61 (C. C. A., 2nd Cir.), affd. 270 U. S. 593.

And it is competent for this Court by its decree to restore the *status quo. Chicago Junction Case,* 264 U. S. 258, 269-270, cited *supra.*

In the case last cited, objection was made that plaintiffs had improperly joined with the suit to set aside an order of the Interstate Commerce Commission, a suit to restore the *status quo.* It was urged that the United States, a necessary party, could be sued only as Congress consented, and that the consent given by the statute does not extend to a suit in which it is sought to set aside both the order and rights acquired by private persons thereunder. The Court said:

> "There is nothing in the legislation to indicate that Congress intended such a limitation of the scope of the relief to be afforded. * * * To permit the joinder objected to could not prejudice the United States. To prohibit the joinder would, in large measure, defeat the very purpose of the bill, and would clearly prevent that expedition in affording relief which it was the purpose of Congress to insure. * * * If this suit had been brought by the United States, the court would have given the complete relief prayed for (citations). The same rule should apply where the suit to set aside is brought by a private party."

Here, both petition and supplemental bill pray, as authorized by subdivision 28 of Section 41, Title 28, United States Code, that the carrying out of the respective orders be enjoined. They also pray for other and further relief. Equity adapts its relief to the situation existing when it makes its determination; and the prayer for relief is sufficient to authorize the granting of full relief in the premises. Refusal, on annulling the orders, to direct restoration of the *status quo* "would, in large measure, defeat the very purpose of the bill."

Respectfully submitted,

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APPENDIX.

Statutes.

Pertinent provisions of the Interstate Commerce Act (24 Stat. 379), as amended by the Transportation Act, 1920 (41 Stat. 456), are as follows:

Section 5 (U. S. Code, Title 49, Sec. 5):

(2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

(3) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.

(4) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient

management earn substantially the same rate of return upon the value of their respective railway properties.

(5) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. The consolidations herein provided for shall be in harmony with such plan.

(6) It shall be lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, under the following conditions:

(a) The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the Commission.

(b) The bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the Commission. The value of the properties sought to be consolidated shall be ascertained by the Commission under section 19a of this Act, and it shall be the duty of the Commission to proceed immediately to the ascertainment of such value for the properties involved in a proposed consolidation upon the filing of the application for such consolidation.

(c) Whenever two or more carriers propose a consolidation under this section, they shall present their

application therefor to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties sought to be consolidated is situated and the carriers involved in the proposed consolidation, of the time and place for a public hearing. If after such hearing the Commission finds that the public interest will be promoted by the consolidation and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, with such modifications and upon such terms and conditions as it may prescribe, and thereupon such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

(7) The power and authority of the Commission to approve and authorize the consolidation of two or more carriers shall extend and apply to the consolidation of four express companies into the American Railway Express Company, a Delaware corporation, if application for such approval and authority is made to the Commission within thirty days after the passage of this amendatory Act; and pending the decision of the Commission such consolidation shall not be dissolved.

(8) The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the "anti-trust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

Section 20a (U. S. Code, Title 49, Sec. 20a):

(1) That as used in this section the term "carrier" means a common carrier by railroad (except a street,

suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized

or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2).

(4) Every application for authority shall be made in such form and contain such matters as the Commission may prescribe. Every such application, as also every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

(5) Whenever any securities set forth and described in any application for authority or certificate of notification as pledged or held unencumbered in the treasury of the carrier shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of by the carrier, such carrier shall, within ten days after such sale, pledge, repledge, or other disposition, file with the Commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the Commission.

(6) Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceeding. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

Provisions of State Constitutions and Statutes.

ILLINOIS.

CONSTITUTION, ARTICLE XI, SECTION 11:

No railroad corporation shall consolidate its stock, property or franchises with any other railroad owning a parallel or competing line.

CHAPTER 114 OF ILLINOIS STATUTES, PARAGRAPH 36:

All railroad companies now organized, or hereafter to be organized, under the laws of this state, which now are, or hereafter may be, (1) in possession of and operating in connection with or extension of their own railway lines, any other railroad or railroads in this state, or in any other state or states, (2) or owning a majority of the stock of any other railroad or railroads in this state or in any other state or states, (3) or owning and operating a railroad which connects at the boundary line of this state with a railroad in another state, are hereby authorized and empowered * * * to purchase and hold in fee simple or otherwise, and to use and enjoy the railroad property, corporate rights and franchises of the company or companies owning such other road or roads, * * * and provided further that no railroad corporation shall be permitted to purchase any railroad which is a parallel or competing line with any line owned or operated by such corporation.

INDIANA.

ACTS OF 1913, PAGE 462 (in force June 1, 1913):

PAR. 13209 (5339a). *Purchase or lease of connecting roads.*—1. (a) Whenever a railroad company, organized under the laws of this state, or under the laws of this state and another state or states, and being a citizen of this state, shall be in possession, by ownership or lease, of a railroad forming a through line with, or which is connected with, a

railroad belonging to or held under lease by a railroad company organized as aforesaid, then either of said companies so organized may sell and convey said railroad so possessed by it, or any part thereof, to said other company so organized * * * or may lease to said other company such railroad or any part thereof * * *. And provided, further, That this act shall not be construed so as to permit any railroad company to purchase or lease any competing line of railroad in this state. * * *

(b) A railroad company organized under the laws of this state, or under the laws of this state and another state or states, may lease its railroad in this state to a railroad company organized under the laws of another state or states whose railroad forms a through line or which is connected with the railroad of the company organized as aforesaid under the laws of this state, or of this state and another state or states, * * *. And provided, further, That this act shall not be construed so as to permit any such railroad company to lease any competing line of railroad in this state.

MICHIGAN.

CONSTITUTION, ARTICLE XII, SECTION 8:

No railroad corporation shall consolidate its stock, property or franchises with any other railroad owning a parallel or competing line.

COMPILED LAWS, CHAPTER 159, PARAGRAPH 8263:

Any railroad company in this State forming a continuous or connecting line with any other railroad company may consolidate with such other Company, either in or out of this State or partly within or partly without this State into a single corporation: "Provided, That no such companies owning parallel or competing lines shall be permitted to consolidate themselves into one corporation * * *."

COMPILED LAWS, CHAPTER 159, PARAGRAPH 8435, SECTION 1:

It shall be lawful for any railroad company organized or that may be organized, under the laws of this state, to sell, lease and convey its road, together with the rights and franchises connected therewith, or any part or portion thereof, to any other railroad company, whether organized within or without this state, and to acquire by lease or purchase from the owner of any other railroad such road, together with the rights and franchises connected therewith, or any part or portion thereof, whether located within or without this state; and for the railroad company so purchasing or leasing to acquire and use such road rights, and franchises, by purchase of the stock or otherwise, as may be agreed between the parties interested, said railroads not having the same terminal points, and not being competing lines.

OHIO.

70 OHIO LAWS 129 (4 Sayler 2950), *passed April 15, 1873, and being "An Act to amend section twenty-four of an act entitled 'An act to provide for the creation and regulations of incorporated companies in the State of Ohio, passed May 1st, 1952 (Swan & Critchfield, page 271), and supplementary to said act.'"*

SECTION 24. Any railroad company heretofore or hereafter incorporated, may at any time, by means of subscription to the capital stock of any other company or otherwise, aid such company in the construction of its railroad for the purpose of forming a connection of said last mentioned road with the road owned by the company furnishing said aid, where the road of the company so to be aided does not form a competing line; or any railroad company organized in pursuance of law may lease or purchase any part or all of any railroad constructed by any other company, if said companies' lines of said road are continuous or connected, and not competing, as aforesaid, upon such terms and conditions as may be agreed upon between said companies respectively,

or any two or more railroad companies whose lines are so connected, and not competing, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created: Provided, that no such aid shall be furnished, nor any purchase, lease or arrangement perfected until a meeting of the stockholders of each of said companies shall have been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such time and place and in such manner as is provided for the annual meetings of said companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, shall have at such meeting assented thereto; and provided, that in case of the lease of any railroad situate in whole or in part within this state, the rental reserved and secured for said leased road shall be equal at least to the net earnings of such leased road for the fiscal year next preceding the one in which said lease is made.

(The foregoing amendment to the original corporation code of Ohio became, when codified in the Ohio Revised Statutes of 1880, Sections 3300 and 3301, and when again codified, in the General Code of Ohio, Sections 8806 to 8809.)

GENERAL CODE, SECTION 8807:

A company may lease or purchase any part or all of a railroad constructed, or in course of construction by another company, if the lines of their roads are continuous or connected, and not competing, upon terms agreed upon between the companies.

GENERAL CODE, SECTION 8809:

No such aid shall be furnished, nor any purchase or lease perfected, until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such

place and in such manner as is provided for the annual meetings of the companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting, assent thereto. In case of the lease of a railroad situate in whole or part within this state, the rental reserved and secured for the leased road shall be equal, at least to its net earnings for the fiscal year next preceding the one in which the lease is made.

GENERAL CODE, SECTION 8813:

No company shall lease its road or any part thereof to another company, whether of this or any other state, as hereinbefore provided, unless the lessor receives full and adequate security for the payment of the rental and for the preservation of its property in as good condition as on entering into possession thereof. If the lessee fails to pay such rental promptly when due, such lease shall be void, at the option of the lessor. The company to whom a railroad is leased, if a corporation of any other state, shall be subject to all the restrictions, disabilities, and duties of a railroad company incorporated within this state.

GENERAL CODE, SECTION 9027:

No railroad corporation shall consolidate its stock, property or franchises of such corporation with or lease or purchase the works or franchises of or in any way control any other railroad or canal corporation owning or having under its control a parallel or competing line.

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No. 5

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE NEW YORK CENTRAL SECURITIES CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 5

THE NEW YORK CENTRAL SECURITIES CORPORATION, appellant

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, the New York Central Railroad Company, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 185) is reported in 54 F. (2d) 122. The original report of the Commission (R. 31) is reported in 150 I. C. C. 278, its supplemental report (R. 93), in 154 I. C. C. 489, and its final report (R. 148) in 158 I. C. C. 317.

JURISDICTION

The decree of the District Court was entered June 24, 1931. (R. 212.) A petition for rehearing filed on June 26, 1931, was denied. (R. 214.) The petition for appeal filed July 23, 1931, was allowed on the same day. (R. 226, 231.)

The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 38, Sec. 345).

QUESTIONS PRESENTED

1. Whether the orders of the Commission (a) authorizing the New York Central Railroad Company to acquire control by lease of the systems of the Big Four, the Michigan Central, and the Chicago, Kalamazoo & Saginaw Railway Company; and authorizing the Big Four to acquire control by lease of properties of the Cincinnati Northern Railroad Company and the Evansville, Indianapolis & Terre Haute Railway Company; and (b) authorizing the assumption of certain obligations with respect thereto, were within the constitutional and statutory authority of the Commission.

2. Whether the findings of the Commission that such acquisitions of control were in the public interest and that the considerations, terms, and conditions of the acquisitions were just and reasonable, are adequately supported by the evidence.

One of the questions considered by the lower court, upon the motion to dismiss, was whether the appellant, as a minority stockholder of the three principal carriers involved, had sufficient standing to maintain a suit under the Urgent Deficiencies Act of October 22, 1913. (*Pittsburgh & West Virginia Railway* v. *United States,* 281 U. S. 479.) It is our view that certain of appellant's contentions may not properly be raised in a suit under that Act (*infra,* pp. 11, 31–34), but that the court below correctly decided the jurisdictional points.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra,* pp. 46–51.

STATEMENT

This is a suit to set aside and annul certain orders of the Interstate Commerce Commission, entered on July 2, 1929 (R. 23, 100), and December 2, 1929 (R. 121), authorizing the New York Central Railroad Company (the New York Central) and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (the Big Four) to enter into certain leases and to assume certain obligations, pursuant to applications therefor made under Section 5 (2) and Section 20a of the Interstate Commerce Act.

On July 29, 1926, the New York Central filed its application under Section 5 (2) for authority to

acquire control, by 99-year lease, of the railroad systems of the Big Four, the Michigan Central Railroad Company (the Michigan Central) and the Chicago, Kalamazoo & Saginaw Railway Company (the Kalamazoo). Contemporaneously, the Big Four filed a similar application for permission to acquire control of the properties of the Cincinnati Northern Railroad (the Cincinnati Northern), and the Evansville, Indianapolis & Terre Haute Railway Company (the Terre Haute). The two applications were consolidated and heard before the Commission in January, 1927, various interested parties, including the appellant and representatives of certain short-line railroads, being allowed to intervene. Appellant opposed both applications as a stockholder of the New York Central, the Michigan Central, and the Big Four, its holdings, including that of Clarence H. Venner, C. H. Venner & Company, and General Investment Company, consisting of 1,152 shares of New York Central, 286 shares of Michigan Central, and 200 shares of Big Four stock. (R. 10.)

On January 14, 1929, the Commission issued a comprehensive report indicating its approval of both applications but withholding final approval until the New York Central entered into negotiations with certain intervening short-line carriers with a view to acquiring their lines. (R. 31, 83.) On April 27, 1929, the New York Central filed a supplemental petition showing that it had complied with the conditions outlined by the Commis-

sion. The Commission thereupon issued its supplemental report and order of July 2, 1929, granting the requested authority. (R. 93, 100.)

On July 24, 1929, the New York Central applied for authority under Section 20a to assume, as lessee, certain obligations and liabilities with respect to the securities of the Big Four, the Michigan Central and the Kalamazoo, and the Big Four made similar application with respect to the securities of the Cincinnati Northern and the Terre Haute. The appellant again intervened. On December 2, 1929, the Commission entered an order granting the requested authority (R. 121–142), a further report being rendered. (R. 148.)

In support of the applications of the New York Central and the Big Four, under paragraph (2), Section 5, it was testified that further unification and coordination of the lines was necessary in order to bring about their handling by one strong operating unit. Certain economies and advantages were expected to be derived from such unified operation, including the revision of routes, and the development of new routes, expected to result in lowered transportation costs and the improved handling of traffic; the adoption of a unified accounting system in place of the detailed accounting theretofore required; and the indefinite postponement of large expenditures contemplated for the creation of additional repair shops, through joint use of the combined facilities.

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There was evidence that the leases were justified by the complementary relationship existing between the carriers. The New York Central was incorporated in 1914 under the laws of six States [1] by the consolidation of eleven carrier companies, including the New York Central & Hudson River Railroad Company and the Lake Shore & Michigan Southern Railroad Company. (R. 35.) Its main line extends from New York City to Chicago by way of Albany, Buffalo, Cleveland, and Toledo, and it has connecting lines in the six States of its incorporation as well as in New Jersey, Massachusetts, and West Virginia. The Big Four, organized in 1889 by a consolidation of three companies, under the laws of Ohio and Indiana, has its main line from a connection with the New York Central at Cleveland through Indianapolis to St. Louis, and important radiating lines from Indianapolis into Ohio and Illinois. The Michigan Central, a Michigan corporation, has its main line from Buffalo along the north shore of Lake Erie to Windsor, Ontario, and Detroit, Michigan, thence across the southern part of the lower peninsula of Michigan to Chicago. (R. 35.) The Kalamazoo operates between Woodbury and Pavilion Junction, Michigan, and connects with the Michigan Central and New York Central at Kalamazoo. (R. 36.) The Cincinnati Northern extends from a connec-

[1] New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois.

tion with the Michigan Central at Jackson, Michigan, to a connection with the Big Four at Franklin, Ohio, whence it operates over the tracks of the Big Four to Cincinnati. The line of the Terre Haute is from a connection with the Big Four at Terre Haute to Evansville, Indiana. The total main-line mileage owned or leased by the six carriers involved in the applications totaled 10,760 miles. (R. 37.)

The Commission found that the Big Four had a peculiar value to the New York Central lines in that it traversed important industrial and agricultural territory in Ohio, Indiana, and Illinois not served by the former, and because of its stations at Ohio, Mississippi, and Illinois river crossings which would extend the lines of the New York Central to connections with the South, Southwest, and West. As to the Michigan Central and the New York Central lines, which traverse opposite shores of Lake Erie, the Commission found that they were complementary, the Michigan Central having the New York Central as its only system outlet to the East at Buffalo, and the New York Central interchanging traffic at that point with the Michigan Central destined to points west and northwest of Lake Erie. (R. 38.) The roads were closely related through stock ownership, the New York Central owning 84.7% of the preferred stock and 91.3% of the common stock of the Big Four; 99.1% of the stock of the Michigan Central; and 40% of the

stock of the Kalamazoo, the remaining 60% being owned by the Michigan Central. (R. 11.) The New York Central and its subsidiaries, the Big Four, and the Michigan Central also have common executives, 13 of the 15 directors of the last two carriers being also directors of the New York Central.

The proposed leases, which were similar except in the rentals provided, embraced the lessor's entire owned and leased properties, including income from investments, and excepting corporate franchises, books, records, special deposits, and securities issued or assumed and nominally outstanding. Cash and current assets were to be applied by the lessee to the liquidation of current and deferred liabilities, an accounting to be had upon the termination of the lease. Capital expenditures, including extensions, additions, and betterments, made by the lessee were to be reimbursed by the lessor's issuance of stock, bonds, or other securities, to be taken by the lessee at their fair value, not less than par, as agreed upon or determined by arbitration.

As rent for the leased properties the lessee covenanted to pay the lessor, or for its account, sums required to maintain the lessor's corporate existence, its taxes, and assessments, interest on securities then outstanding or thereafter issued or assumed, rentals and charges accruing under leases and contracts, and specified amounts equivalent to annual dividends upon each share of the lessor's

capital stock not owned by the lessee.[2] The rentals to be paid were (R. 46):

Company	Class of stock	
	Preferred	Common
	Per cent	*Per cent*
Big Four	5	10
Michigan Central		50
Cincinnati Northern		12
Kalamazoo		6
Terre Haute		4

It was provided in the leases that, as an alternative to accepting the prescribed rentals, the minority stockholders might have the option of selling their stock to the lessee at values to be determined by agreement or arbitration.

On August 21, 1929, appellant filed the present suit, alleging, *inter alia:* (a) That the acquisitions by lease would constitute a consolidation of the carriers "into a single system for ownership and operation" within the meaning of Section 5 (2) of the Act and were hence beyond the Commission's permissive authority; (b) that the proposed leases were oppressive to the minority stockholders of the Big Four and Michigan Central because of the rentals provided; (c) that the leases violated the

[2] In the case of the proposed Michigan Central lease the New York Central agreed to pay such dividends on the shares of Michigan Central stock pledged as collateral under a collateral trust indenture of the New York Central & Hudson River Railroad Company, dated April 13, 1898, as would enable the trustee to pay the 3½% interest due on $21,550,000 of bonds secured by the pledge of such stock.

Federal Anti-Trust laws, and that the Commission was without valid power under paragraph (8), Section 5, to suspend the application of such laws; (d) that the Michigan Central lease had not been authorized, as required, by its bond holders; and (e) that the Commission was without authority to condition its approval upon the acquisition by the New York Central of certain short lines.

On December 24, 1929, a supplemental petition was filed attacking the Commission's order under Section 20a of the Act, authorizing the assumption of obligations and liabilities by the New York Central and the Big Four. It was therein alleged (f) that the proposed leases in their rental terms violated the General Code of Ohio, were *ultra vires,* and could not be authorized by the Commission. Answers were filed by the United States, the Commission, and the carriers to the original petition (R. 24, 28, 101), to the supplemental petition (R. 158, 144, 160), and the United States and the Commission moved to dismiss (R. 162, 163). The lower court, after hearing, dismissed the petition upon the merits. (R. 212.)

SUMMARY OF ARGUMENT

I

The orders of the Commission authorizing the acquisitions of control and the assumptions of obligation were within the constitutional and statutory powers of the Commission. The acquisitions

of control by lease, although there was antecedent stock control, would not constitute a consolidation beyond the power of the Commission to authorize under Section 5 (2) of the Act. The term "consolidation" means the combination of carriers into one corporation. The Commission has consistently held the view that acquisition of control by long-term lease, preceded by control through stock ownership, is not a consolidation. The interpretation placed upon a statute by the administrative body is entitled to great weight.

The Commission had valid power to authorize the acquisitions, even if the Anti-Trust laws were violated, which is not conceded. Section 5 (8) relieves carriers acting under the Commission's permissive authority from the restraints of such laws. Section 5 (8) is not unconstitutional as an improper delegation of legislative power, nor is the statutory standard of public interest governing the exercise of the Commission's power an insufficient standard.

The appellant, as a minority stockholder of the three principal carriers, can not in this proceeding raise the question whether the leases are within the carriers' charter powers or whether the Michigan Central lease was duly authorized by its stockholders. *Pittsburgh & West Virginia Railway* v. *United States*, 281 U. S. 479. The former question could only be raised in a direct proceeding by the incorporating state and the latter only by a party in interest under the Michigan Central agreement alleged to have been breached. It is not clear,

moreover, that the proposed leases were beyond the carriers' charter powers. If that were assumed, the Commission might still authorize the acquisitions of control and assumptions of liability in view of the exclusive authority granted to it under Sections 5 and 20a with respect to such subjects. Section 20a(2) which requires as a condition to authorizing the assumptions of liabilities the finding of the Commission that the assumption is "for some lawful object within [the applicant's] corporate purposes" does not mean that it shall be within the carrier's charter powers.

The Commission as a condition to its order authorizing the acquisition of the leases required the New York Central to make provision for taking over certain intervening short-line carriers. Since the New York Central has complied with the condition, the appellant, a minority stockholder, can not complain of it in this suit. However, the Commission had power to attach the condition, Section 5(2) expressly permitting it to grant conditional approvals. The condition was reasonable in view of the evidence and the general purposes of the Transportation Act.

II

The Commission's findings that the terms of the proposed leases were just and that the acquisitions of control would serve the public interest are adequately supported by the evidence. The leases provided for payments to minority stockholders of

$5 per share on Big Four preferred stock, $10 on Big Four common stock, and $50 on Michigan Central stock; or, in the alternative, that the lessee would purchase such stocks at prices fixed by arbitration. The rentals payable on Big Four and Michigan Central common stocks were approximately double the average dividend payments for the years 1922 to 1927, and constituted, respectively, a return of 4.9% and 7.8% on the stockholders' equities per share. Although both the Big Four and Michigan Central had large surpluses, the Commission considered that fact in approving rentals as high as those provided. The payments guaranteed over a 99-year period involve risks to the operating road, with a correlative diminution in risk to the minority stockholders, which must be considered in passing on the fairness of the rental terms. The entire transaction was subjected by the Commission and the lower court to that careful scrutiny required where one of the parties has conflicting interests.

The Commission's finding that the public interest would be served by the acquisitions is justified by the evidence. There was testimony that numerous advantages, such as the direct and more economical routings of traffic, reduced transportation and accounting expenses, and the postponement of contemplated construction of additional repair shops, would result from the joint operation of the roads. The matter is essentially for the determination of the administrative body.

141696—32——3

ARGUMENT

I. THE ORDERS OF THE COMMISSION AUTHORIZING THE ACQUISITION OF CONTROL AND THE ASSUMPTION OF OBLIGATIONS WERE WITHIN ITS CONSTITUTIONAL AND STATUTORY POWERS

The issues raised by appellant (*supra,* p. 9) relate both to the scope of the Commission's power under Sections 5 and 20a of the Interstate Commerce Act and to the propriety of its action in authorizing the consummation of the leases described in the applications. The contentions based upon the lack of statutory authority center chiefly upon the construction to be placed upon Section 5 of the Act, although the claim that the proposed leases are beyond the charter powers of the corporations involves a consideration of the language of Section 20a of the Act. Only one constitutional question is raised, *viz,* whether Section 5(8) constitutes an improper delegation of legislative power. The questions relating to the Commission's power will be first considered.

1. The acquisitions of control authorized by the Commission do not constitute a consolidation under Section 5(2)

Appellant's first contention is that the Commission was without power under Section 5(2) to authorize the acquisitions of control by lease since a consolidation would result.

Section 5 of the Interstate Commerce Act contains provisions, added by Transportation Act, 1920 (41 Stat. 480), which are directed toward securing

a more efficient and adequate transportation service through closer coordination of the carriers in rendering the general transportation service. Paragraph (1) of that section empowers the Commission to authorize by order the pooling of freights and with that we are not here particularly concerned. Paragraphs (2) and (3) provide that:

> (2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.
>
> (3) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.

The succeeding paragraphs direct the Commission to prepare and adopt a plan for the consolida-

tion of the railroads into a limited number of systems, whereunder "competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained;" to give due publicity to its tentative plan and after reasonable notice, including notice to the States and following hearings, to adopt and publish a plan; "but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest." Paragraph (6) states that it shall be lawful for two or more carriers "to consolidate their properties or any part thereof, *into one corporation* for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation," subject to the conditions that the consolidation must be in harmony with and in furtherance of the complete plan of consolidation adopted by the Commission and must be approved by the Commission. Applications to the Commission for such approval and hearings thereon are provided for. Paragraph (8) provides that the carriers affected by any order "made under the foregoing provisions of this section" shall be relieved from the antitrust laws "and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or *required* by any order made under and pursuant to the foregoing provisions of this section."

Appellant asserts that the leasing of the Big Four, and the Michigan Central for 99 years, when considered in the light of the New York Central's antecedent stock control, would constitute a "consolidation" within the foregoing provisions of Section 5.

There is nothing in Section 5(2) which limits the power of the Commission to approve leases to cases where control does not already exist by stock ownership. The Commission is authorized to approve acquisitions either under lease or by the purchase of stock, or in any other manner, provided consolidation under a single system for ownership and operation does not result. The only question is as to the meaning of "consolidation." That term is qualified in Section 5(2) by "a single system for ownership and operation," and in Section 5(6) by "into one corporation." The only test therefore, is whether there results ownership by one corporate entity. The leases here expressly provide that the corporate identities of the lessor roads shall be preserved, provision being made for the return of the leased roads at the termination of the leases. No new corporation in which title is vested is created by the proposed leases, title to the leased properties remaining in the lessor roads. The distinction made by Section 5 between consolidations and other acquisitions of control is that which exists under the general law. A consolidation is generally defined as a combination of cor-

porations resulting in the creation of a new corporation (in which title to the assets is vested) and usually in the dissolution of the constituent companies. *Railroad Company* v. *Georgia,* 98 U. S. 359, 363; *Minneapolis & St. Louis Railway Co.* v. *Gardner,* 177 U. S. 332; *Lee* v. *Atlantic Coast Line R. Co.,* 150 Fed. 775, 787.

If it be assumed that there is any ambiguity in Section 5 as applied to a situation where the sought control by lease is preceded by stock control, that ambiguity has been resolved in favor of the construction of the term "consolidation" so as not to apply to the present situation by the administrative interpretation placed upon the section by the Commission. In *Logan* v. *Davis,* 233 U. S. 613, 627, this Court said:

> * * * Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. *United States* v. *Moore,* 95 U. S. 760, 763; *Hastings and Dakota Railroad Co.* v. *Whitney,* 132 U. S. 357, 366; *United States* v. *Alabama Great*

Southern Railroad Co., 142 U. S. 615, 621; *Kindred* v. *Union Pacific Railroad Co.*, 225 U. S. 582, 596.

To the same effect see *B. & M. R. R. Co.* v. *Hooker*, 233 U. S. 97, 118, and *New Haven R. Co.* v. *Int. Com. Comm.*, 200 U. S. 361, 401.

That the Commission has consistently interpreted section 5 (2) as empowering it to authorize similar acquisitions of control, and pursuant to such authority unification of many thousands of miles of railroad has been accomplished, is shown by decisions of the Commission, among which the following may be mentioned: *Control of El Paso & S. W. System*, 90 I. C. C. 732; *Control of Alabama & Vicksburg, etc.*, 111 I. C. C. 161, 169; *Lease of Pan Handle*, 72 I. C. C. 128, 133; *New York Central Leases*, 72 I. C. C. 243; *Control of Central Pacific*, 76 I. C. C. 508. In *Nickel Plate Unification*, 105 I. C. C. 425, although the proposed acquisition was held not to be in the public interest, the Commission nevertheless held it had jurisdiction. At page 430 the decision reads:

> The second question raised by interveners is that we are without authority under paragraph (2) of section 5 of the act to approve the application for unified control and operation in the manner proposed, as they contend it is in effect a consolidation of the carriers into a single system for ownership and operation. It seems only necessary to

refer to many other cases where we have held that control effected by means similar to those proposed here did not constitute a consolidation into a single system for ownership and operation as contemplated in paragraph (2) of section 5. See *Control of El Paso & Southwestern System,* 90 I. C. C. 732. Counsel for interveners attempt to distinguish many of the Pennsylvania lease cases on the ground that no question of control by purchase of stock was involved. But we were dealing with acquisitions of control by means of 999-year leases where the Pennsylvania already controlled the entire capital stock, except in one instance where 98 per cent was held. The fact that here acquisition of control by purchase of stock and by lease is sought does not change the essential nature of the transaction from one where all the stock is already owned and further control is sought by means of a long-term lease. We therefore conclude that we have jurisdiction under paragraph (2) of section 5 to consider this application.

It was alleged below that the effect of construing Section 5 so as to permit the approval of leases under such circumstances would be to destroy the efficacy of the consolidation plan as visioned by Congress; that the unscrambling of properties might be required by reason of the adoption of a final consolidation plan. The language of paragraph (2) discloses an intention to place discretion with the Commission in this particular. The

power conferred is to authorize acquisitions of control "to the extent indicated by the Commission * * * either under a lease or by the purchase of stock or in any other manner * * *." In short, the acquisition of control may be under the terms of a lease or in any other manner and the extent thereof is left to the discretion of the Commission, subject only to the qualification that it shall not constitute a consolidation "into one corporation," as aforesaid. Prior to the hearings before the Commission it had prepared a tentative consolidation plan in which the Big Four and the Michigan Central lines were assigned to the New York Central system. *Consolidation of Railroads,* 63 I. C. C. 455, 456. Prior to the decision below the Commission had adopted its final plan of consolidation, in which the New York Central, Michigan Central, Big Four, Cincinnati Northern, Terre Haute, as well as the short-line carriers were all assigned to the New York Central system. 159 I. C. C. 522. While these facts are not strictly relevant to the issue of the Commission's authority under Section 5(2), they indicate that, in line with its qualified discretion above mentioned, the Commission considers in cases under that Section the possible effect which the authorization may have in relation to the ultimate consolidation plan, and, further, that appellant's fears as to the possibility of unscrambling the properties were unfounded.

141690—32——4

2. The Commission had valid power to authorize the acquisitions as against the claim of violation of the antitrust laws

Appellant alleged that the Commission lacked power to authorize the acquisitions of control by lease, since the Federal Anti-Trust laws would be violated, and that if Section 5 (8) were construed so as to permit the exercise of such power, it would be invalid as an improper delegation of legislative power to the Commission. (R. 17.) It was also alleged that the lessor and lessee lines were parallel and competing, joint control of which was proscribed under applicable state statutes (R. 20), but this point is apparently relied on in support of the claim of *ultra vires*, elsewhere considered (*infra*, p. 26).

Even assuming that the acquisitions would violate the Anti-Trust laws, which is not conceded, it is clear that the approval by the Commission of the application operates *ipso facto* as a suspension of such laws. Section 5 (8) expressly provides that any carrier affected by any order of the Commission made under the foregoing provisions of the section is relieved from the operation of the antitrust laws. It has been held that even where a carrier has violated the antitrust laws by the acquisition of control of a competing carrier, it might thereafter apply to the Commission for authority under section 5 (2) to reacquire such control, and that the Commission's authorization operates to relieve the operation of the Sherman Law (as well

as other restraints or prohibitions of law, State or Federal). *United States* v. *Southern Pacific Co.* 290 Fed. 443 (D. C. D. Utah, 1923).

Appellant contends, however, that Section 5 (8) is unconstitutional as an attempted delegation of legislative power. Under Section 5 (8), the Commission is not charged with the duty of exempting particular carriers from the provisions of the Anti-Trust laws, but it determines applications for acquisitions of control in accordance with the governing standards, the statute itself providing such exemption. There is then no delegation of the power to exempt except by indirection. Even if the exemption were provided by the Commission's order rather than by the statute, however, the claim would not be well founded. In *Lehigh Valley R. Co.* v. *United States,* 234 Fed 682 (affirmed on another ground, 243 U. S. 412), the court upheld the provisions of Section 12 of the Panama Canal Act (Act of August 24, 1912, c. 392, 37 Stat. 567.) which authorized the Commission to select carrier for specific exemption from the provisions of that Act (which were intended to preserve competition), as against the claim that the section was void as constituting a delegation of legislative power. In *United States* v. *Grimaud,* 220 U. S. 506, the court upheld an act providing for the creation of forest reserves, which act provided criminal penalties for violations of regulations of the Secretary of Agriculture made thereunder. If criminal penalties can be imposed

for the violation of executive regulations, it would appear that the power to exempt from penalties might validly be delegated. The appellant asserts, however, that the standard for exemption from liability, *viz.*, the Commission's finding of public interest, is vague and insufficient. The standards that rates shall not be unreasonable and that discrimination shall not be undue or unjust, under which the Commission performs its "everyday" work, are not definite guides. Standards no more precise have been upheld in *Buttfield* v. *Stranahan,* 192 U. S. 470; *Mutual Film Corporation* v. *Ohio Industrial Commission* 236 U. S. 230; *Mahler v. Eby,* 264 U. S. 32; *Colorado* v. *United States,* 271 U. S. 153, and *American Bond & Mortgage Co. & Trianon, Inc.,* v. *United States,* 52 F. (2d) 318.

3. The claim that the leases proposed would exceed the carriers' charter powers is not a proper subject of inquiry in this suit and is without merit

It is contended that the Commission's orders are invalid because of Section 8809 of the General Code of Ohio, requiring in case of the lease of roads situated in whole or in part within the State that the rental reserved should be at least equal to the carrier's net earnings for the fiscal year preceding the lease. (R. 119.) It is also suggested that State laws prohibit the joint control of parallel and competing lines. (R. 24.) Involved is a consideration of Section 20a (2) as well as Section 5. Pre-

liminary to consideration of the merits of this claim is the question whether there may be injected into a suit under the Urgent Deficiencies Act the issue of corporate capacity of applicant carriers to perform acts permitted by the Commission. In *Pittsburgh & West Virginia Railway Company* v. *United States,* 281 U. S. 479, the court held that a minority stockholder of the Wheeling & Lake Erie could not maintain a suit, under the Urgent Deficiencies Act, to enjoin an order of the Commission authorizing the Wheeling to abandon its passenger station at Cleveland and to use other station facilities. It was contended in that case that the Wheeling had executed contracts without first securing the consent of stockholders as required by Ohio law. The Court dismissed the contention, holding that the question whether the Wheeling could legally exercise the authority granted by the Commission could not be raised in a suit under the Act of October 22, 1913, but only in a suit invoking the plenary equity jurisdiction of the district court. It is doubtful even whether the question here presented could be raised except in a direct proceeding by the State. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *United States,* 275 U. S. 404, 414; *Kerfoot* v. *Farmers' & Merchants' Bank,* 218 U. S. 287. The authority exercised by the Commission was permissive in character and it was never intended by the Act that the Commission should be under the duty of determining mat-

ters relating to the corporate powers of applicants before granting or withholding its assent to the proposals outlined in the applications. *Claiborne-Annapolis Ferry Co.* v. *United States et al.*, 285 U. S. 382.

Passing to the merits, it is not clear that the leases are *ultra vires*. The provision of the Ohio law (Sec. 8809, General Code Ohio), relating to the minimum rental was regarded by the lower court as being separable from a provision which conferred the power to lease and was deemed merely a restraint placed upon the exercise of the power. (R. 197.) The State of Ohio has not asserted any claim of *ultra vires* although its representative intervened before the Commission in support of the request of the Federal Valley Railroad that its properties be taken over by the New York Central. (R. 34.) The New York Central and Big Four charter powers are involved by reason of their multiple incorporation. (R. 35.) The effect of incorporation in several states is to create different corporations in each state, with possibly varying powers. *Muller* v. *Dows*, 94 U. S. 444. *Nashua & Lowell Railroad Corporation* v. *Boston & Lowell Railroad Corporation*, 136 U. S. 356. There is no allegation that the rental terms were beyond the carriers' powers as corporations of states other than Ohio.

Assuming, however, that the leases are *ultra vires*, appellant's attack on the order rests upon

the claim: That Section 20a (2) limits the Commission in the entry of orders authorizing the assumption of obligations to instances where the assumption will be within the charter powers of the carrier, by reason of the proviso that the assumption of liability shall be found to be "for some lawful object within [the applicant's] corporate purposes." Appellant reasons that if the leases were beyond the carriers' corporate powers, the Commission was without power to make such a finding. It is clear, by reference to the section and to its legislative history, that Congress did not intend so to limit the Commission's authority. Paragraph (7), Section 20a, provides that the jurisdiction conferred upon the Commission shall be exclusive and that a carrier may issue securities and assume obligations without securing approval other than that of the Commission. That the clause referring to "corporate purposes" does not connote "charter powers" is apparent from the legislative history of the section.[3] Since Section

[3] This provision first appeared in 20a(7) of the Esch-Pomerene Bill, June 2, 1919 (66th Cong., 1st Sess., H. R. 4378, S. No. 1256), and substantially in Section 24 of the Cummins Bill, August 23, 1919 (66th Cong., 1st Sess., S. No. 2906). Later it became Section 437 of the next Esch Bill (66th Cong., 1st Sess., H. R. No. 10453), which was Section 439 of the Cummins Bill. On November 17, 1919, an amendment was offered in the House to strike this paragraph and to provide that no security should be issued under the Act "except in the manner and form prescribed by the laws of the state which created such common carrier, and that this section is not to be construed as a limitation of state author-

20a was intended to relieve carriers from state restrictions, appellant's contention is without merit if Congress had valid power to supersede state control in this field. This Court has held that Congress can validly authorize carriers to perform certain acts beyond their charter powers. In *New York* v. *United States,* 257 U. S. 591, it was held that the Commission had power to authorize a carrier to increase its intrastate rates

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ity, but only as cumulative thereof." This amendment was defeated after debate (Cong. Rec. 66th Cong., 1st Sess., Vol. 58, pt. 9, pp. 8673–8676). In the Esch-Pomerene Bill the phrase "corporate purposes" originally read "corporate powers." Apparently "corporate purposes" was substituted at the suggestion of counsel for the Association of Railway Executives who pointed out that "powers" might be construed to mean state powers. (Hearings before the House Committee on Interstate and Foreign Commerce, 66th Cong., 1st Sess., H. R. 4378, pt. 8, p. 1267.) Senator Cummins' report regarding Section 24 of his bill states:

"But I think there is no real opposition to a provision which confers upon the Interstate Commerce Commission or some other federal agency the supervision of the issuance of railway securities, in that way relieving railway companies of the regulation of 40 of the 48 states of the union. * * * This is intended to concentrate that power in the hands of a federal tribunal." (Cong. Rec. 66th Cong., 2nd Sess., Vol. 59, pt. 1, pp. 137–138.)

Mr. Esch in his report to the House stated:

"Without federal control, the carriers would have to be subjected to the diversified requirements of the several states. * * * The enactment of the pending bill will put the control over stock and bond issues exclusively in the hands of the Federal Government and will result in uniformity and greater promptness of action." (66th Cong., 1st Sess., H. R. No. 457, Nov. 10, 1919.)

beyond the maximum prescribed under its state charter. (*R. R. Comm. Wisconsin* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563.) In *Colorado* v. *United States*, 271 U. S. 153, the Court held that the Commission had power to authorize the abandonment, as respects both intra- and interstate traffic, of a branch line of a railway lying wholly within the State of its incorporation, even though such abandonment was opposed by the State and was assumed to be not authorized by its corporate charter.

4. The Commission's orders can not be attacked upon the ground that the Michigan Central lease was not duly authorized

Appellant alleges that shares of stock in the Michigan Central owned by the New York Central and pledged with the Guaranty Trust Company, under an indenture of April 13, 1898, were illegally voted in favor of the leasing of the road in violation of the terms of the indenture, which required the prior consent of 75% in interest of the bondholders. (R. 19.) Appellant does not claim to be the holder of any of the bonds, its sole interest being as a Michigan Central shareholder. Upon the foregoing discussion, it is submitted that this issue can not be raised in this proceeding. (*Supra*, pp. 24–29.) Moreover, appellant is not a party in interest under the agreement and could not raise the point in any proceeding. *Arkadelphia Milling Co.* v. *St. Louis & S. W. Railway Co. et al.*, 249 U. S. 134, 149, and *Market St. Ry. Co.* v. *Hellman*, 109

Cal. 571, 42 Pac. 225. *Raff* v. *Darrow*, 184 Ind. 353, 111 N. E. 189.

5. The condition in the Commission's order relating to the acquisition of connecting short-line carriers was within its statutory powers, and since the New York Central elected to comply the matter is not one of which appellant stockholder can complain in this proceeding

The Commission in its original report found that the proposed acquisition of control was in the public interest, but it further found that preservation of six connecting short lines [4] was "required by the public convenience and necessity and for the maintenance of an adequate transportation system, as conceived, and provided for by the transportation act," and that, to that end, its authorization of the unification should be upon the express condition that the New York Central shall offer to acquire those short lines at their commercial values,[5] to be

[4] The interveners were: The Chicago, Attica & Southern Railroad Company, the Delaware & Northern Railroad Company; Fonda, Johnstown & Gloversville; The Owasco River Railway; The Southern New York Railway, Inc.; The Ulster & Delaware Railroad Company, and the Casey & Kansas and Kansas & Sidell Railroad Companies.

[5] Prior to the adoption by the Commission of its plan of consolidation, the acquiring by one railroad of the properties of another required no authority from the Commission under Section 5(6) as a consolidation matter. *Snyder* v. *N. Y. C. & St. L. R. Co.*, 160 N. E. 615, 278 U. S. 578. It could be done upon certificate of public convenience and necessity granted under Section 1(18) (U. S. Code, title 49, sec. 1(18)), provided it involved no substantial lessening of competition within the meaning of the Anti-Trust Acts.

determined by agreement or by arbitration in the manner prescribed in the leases for valuation of minority shares of stock of the lessors. Entry of an order authorizing the unification was deferred until the New York Central should have filed proof of bona fide offers to acquire said short line in compliance with the condition. (R. 83, 84.) Subsequently the New York Central made proof, satisfactorily to the Commission, of its compliance with this condition. (R. 99, 21.)

(a) Appellant stockholder can not challenge the judgment of its corporation in this proceeding

As a stockholder of the New York Central, appellant complains of the action of the Commission in declining to approve the leases unless provision was made for the taking over of said connecting short-line carriers. (R. 21, 84.) It is alleged that the New York Central did not need the lines and that their acquisition would impose a financial drain on it. In view of the fact that the Commission's action was permissive and that the New York Central chose to comply with the condition, it would seem clear that appellant is without recourse in this proceeding.

If it be conceded that appellant stockholder has standing to attack the permission given to its corporations to "unify," the difference between the interest which gives it that standing and the interest which supports its alleged grievance in respect of the acquisition by the New York Central of the

connecting short lines is sharply drawn. Appellant was stockholder in two aspects of the railroad companies involved in the main unification; namely, of the lessee companies and the lessor companies. As stockholder of the lessor companies its standing to maintain this suit is not merely derived through its ownership of stock, but is through alleged injury to itself as a member of a class created by the leasing agreements. The payment of rental dividends is to be made directly to the minority stockholders of the lessor companies and the latter are, in effect, third party beneficiaries of the lease agreements authorized by the Commission in all of their terms, and as such they have an independent interest, as well as such other interest as they may have, adverse to majority stockholders controlling the lessor corporations. (R. 189.) But as concerns the condition in the order that the New York Central acquire the connecting short lines, not only is appellant's asserted grievance solely the indirect harm it fears might result through harm to its corporation,[6] but it stands in the position of challeng-

[6] In a footnote in this court's opinion in *Pittsburgh & W. Va. Ry.* v. *U. S.*, 281 U. S. 479, the Commission report in the instant case was cited among other instances of reorganization or finance cases, in respect whereof minority stockholders might have standing to attack the Commission's order of authorization. But the stockholder's interest in the rental dividends or other terms affecting him directly as stockholder is shown by the court's opinion to have a different status than the indirect harm it fears may result from harm to his corporation.

ing the judgment of its corporation which has accepted the condition. In *Pittsburgh & W. Va. Ry. v. United States, supra,* the court held that the appellant's stockholder interest in Wheeling & Lake Erie Railway Company did not give it standing to maintain a suit to set aside an order of the Commission authorizing said railway to abandon certain operations and undertake others. While it is appreciated that the question here is not one of standing, what was there said by the court brings out clearly the character of appellant's asserted grievance in respect of the condition relating to the connecting short lines. At page 486–487 the decision reads:

> * * * Finally, the claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder, is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. This financial interest does not differ from that of every investor in Wheeling securities or from an investor's interest in any business transaction or lawsuit of his corporation. Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another, the order under attack does not deal with the interests of investors. The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insuffi-

cient to give the Pittsburgh a standing independently to institute suit to annul this order. The bill should have been dismissed without inquiry into the merits.

Appellant's interest in respect of the condition that the New York Central acquire the short lines is solely by reason of its ownership of stock in that railroad. "The injury feared is the indirect harm which may result to every stockholder from harm to the corporation." Its "financial interest does not differ from that of every investor in Wheeling (New York Central) securities or from an investor's interest in any business transaction or lawsuit of his corporation." The New York Central accepted the condition, and appellant, as minority stockholder, therein can not attack the judgment of its corporation in this proceeding.

(b) Section 5(2) expressly empowers the Commission to attach conditions to its orders authorizing acquisitions of control and the condition in respect of the short lines was plainly within the remedial purpose of the Act

At the hearing on the applications under Section 5(2) nine short-line carriers intervened, asking that their properties be acquired by the New York Central as a condition to the Commission's sanction of the lease. Evidence was submitted by them showing the character and condition of their roads, their relationships with the New York Central, and the benefits which might be expected to flow from their inclusion in the New York Central system.

The New York Central opposed the request of the interveners and submitted evidence as to their financial conditions, etc. The Commission, in its report of January 14, 1929, discusses the facts adduced as to each of the short lines, and found, as to the Delaware and Northern, the Southern New York, and the Casey and Sidell, that there was no basis for their inclusion in the New York Central system. (R. 51–71.) It found that the remaining six lines were complementary to the New York Central system, and that their preservation was required in order to maintain an adequate transportation system. Authorization to enter into the proposed leases was conditioned upon the New York Central's offering to acquire these lines at values fixed by agreement or arbitration, the Commission withholding its order of authorization until compliance with this condition had been shown. (R. 84.) In its supplemental report of July 2, 1929, the Commission stated that the New York Central had substantially complied with the prescribed condition and entered its final order. (R. 94, 100.) Section 5(2) expressly authorizes the Commission to approve applications subject to conditions found by it to be just and reasonable. (Appendix, *infra*, p. 46.) A similar provision is found in Section 20a (2). (*Infra*, p. 48.) It is clear that the language of Section 5(2) affords no support to appellant's

contention that the Commission can not qualify its approval by prescribing conditions not found in the application. *Atlantic Coast Line R. R. Co.* v. *United States,* 284 U. S. 288. Since there is no claim that the condition imposed does not concern the regulation of commerce (*United States* v. *Chicago, etc., R. Co.,* 282 U. S. 311), the only question is whether the condition is just and reasonable and within the scope of the purpose of the Act. The Court has stated that the Transportation Act, 1920, was intended to develop and maintain an adequate general transportation system. *Texas & Pacific Ry. Co.* v. *Gulf, etc., Ry.,* 270 U. S. 266, 277. The protection and development of the weaker lines is one of the principal means by which the Act seeks to achieve that general purpose. Sections tending to effect that object are those relating to the recapture of excess income (Section 15a, *Dayton Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456); to the division of joint rates (Section 15 (6), *Orient Divisions Case,* 265 U. S. 274, 284); and to the fixing of minimum rates so as to prevent cut-throat competition (Section 15 (1), *New England Divisions Case,* 261 U. S. 184, 190, note). It is palpably clear that the condition imposed was within the Commission's power.

II. THE COMMISSION'S ORDERS OF AUTHORIZATION ARE ADEQUATELY SUPPORTED BY EVIDENCE

1. The Commission's finding that the terms of the proposed leases were just is amply supported by the evidence

The remaining questions, *viz.*, whether the rentals provided by the leases were just and whether the acquisitions would be in the public interest, relate to the propriety of the exercise of the Commission's power to authorize the acquisitions of control and the assumption of obligations. Since there is no claim of confiscation, the scope of review is that ordinarily accorded where a full hearing is afforded, namely, where the findings of the Commission are supported by substantial evidence. *Virginian Railway* v. *United States,* 272 U. S. 658, 663; *Colorado* v. *United States,* 271 U. S. 153, 166. Particular attention was given by the Commission and by the lower court to the rental terms, in view of the New York Central's interests in the lessor roads. (R. 76–82, 192–193.) It should be observed that there was no direct allegation in the petition that the Commission's findings were not supported by adequate evidence.

Appellant contends that the rentals provided in the form of annual dividends were disproportionate to the earning powers of the Michigan Central and Big Four and constituted an inadequate return upon the value of the minority stockholders' equities. The leases provided for the payment of rental dividends of $5 to minority holders of Big Four

preferred stock, $10 to Big Four common stock, and $50 to Michigan Central common stock. (R. 46.) In the event that the stockholders chose not to accept the terms, the lessee agreed to purchase their stocks at prices fixed by arbitration. At the hearing date there were outstanding: Big Four common stock having a par value of $47,028,700 ($4,087,600 of which was owned by minority interests[7]) (R. 40); $9,998,500 par value of Big Four preferred stock (of which $1,530,400 was not owned by New York Central interests), and Michigan Central stock having a par value of $18,736,400 ($152,300 of which was owned by the minority). Appellant held 286 shares of Michigan Central stock and 100 shares each of the preferred and common stocks of the Big Four. (R. 10.) The maximum amounts payable as rentals under the leases were $76,520 on the Big Four preferred stock; $408,760 on its common stock; and $76,150 to the holders of Michigan Central stock, exclusive of sums payable to the trustee under the indenture of April 13, 1898. (R. 80.)

The $10 rental dividends provided for Big Four common stock may be contrasted with dividends paid over a five-year period from 1922 to 1926, namely, in 1922, $5; 1923, $4; 1924, $5; 1925, $5.50; 1926, $7; an average of $5.50 per share. (R. 42.)

---

[7] $2,360,000 par value of Big Four Common Stock was held by a protective committee and was subsequently sold to the New York Central.

The 5% rental provided for Big Four preferred stock is equivalent to that provided by the provisions relating to that class of stock, and is not here objected to. Prior dividend payments to the holders of the Michigan Central stock, for which the rental provision was $50 per share, were: 1922, $14; 1923, $20; 1924, $20; 1925, $27.50; 1926, $35; 1927, $40 (exclusive of a 50% dividend in that year from accumulated surplus.) (R. 42.)

In considering the adequacy of the payments to be made to the holders of the common stocks of the Michigan Central and the Big Four, the Commission had before it evidence as to the book value of the stockholders' equities (R. 82); statistical studies showing the relation of net earnings to the average market prices of the stocks of certain major carriers over a period of years (for the purpose of determining ratios which would aid in fixing the value of the stocks) (R. 76–77); evidence as to the market values ascribed to guaranteed stocks at various yields and comparisons of dividends paid by strong companies upon stocks guaranteed under lease with dividends paid by operating companies (R. 78); opinion evidence as to the fairness of the rental terms (R. 79); and comparisons between the ratio of past dividend payments to average net income available and the ratio of the rentals provided to such average net earnings. The following table, quoted from the lower court's opinion, summarizes a portion of the evi-

dence upon which the Commission based its finding that the terms were just and reasonable (R. 194; R. 42, 43, 81, 82):

	1 Stockholders' equity per share, Nov. 1, 1927	2 Market value [1] [2]	3 Average net earnings per share [3]	4 Average dividend payments per share	5 Rentals under the leases
Big Four	$201.75	[4] $179.75	$19.86	[5] $5.30	$10.00
Michigan Central	639.78	[4] 827.25	85.78	[7] 23.20	50.00

	6 Ratio of dividend payments to net income available [6]	7 Ratio of rentals to average net earnings	8 Ratio of rentals to stockholders' equity per share	9 Ratio of average dividend payments to value [2]	10 Ratio of rentals to value [2]
	Per cent	*Per cent*	*Per cent*	*Per cent*	*Per cent*
Big Four	25	50	4.9	2.9	5.6
Michigan Central	[7] 24	58	7.8	[7] 2.8	6.0

[1] Including New York Central Lines.

[2] The estimated market value per share was determined by using as a standard comparison the ratio of net earnings to average market value of the stocks of certain major carriers of the country over a period of years. With this was also compared the ratio of guaranteed dividends to market value of railroad stocks, affording some indication that the guaranteed rental might result in an appreciation in market value of Big Four stock held by the minority.

[3] Average for 1922–1927.

[4] Average for 1924–1927, computed on basis of ratio of earnings to market value of major carriers, 1915–1925.

[5] Average for 1922–1926.

[6] Found by Commission for 1921–1926.

[7] Exclusive of extra dividend of 50 per cent of accumulated surplus in 1927.

It appears from the table that the rental dividends provided were approximately twice the average dividend payments for the years 1922–1927; that they constituted approximately 50% of the amount of average net earnings available for the payment of dividends in such years, and a return of 4.9% and 7.8%, respectively, on the stockhold-

ers' equity per share in the Big Four and Michigan Central.

It is urged, however, that the dividend rentals are manifestly inadequate in view of the large earned and undistributed corporate surpluses of the Big Four and Michigan Central, as of November 30, 1927. (R. 82.) The Commission, however, considered the existence of such surpluses in arriving at the conclusion that rentals as high as those provided for by the leases would be in the public interest. (R. 82.) One of the Commissioners thought the rentals excessive. (R. 86.) It must be considered that the maintenance of a surplus, such as those here existing, is necessary in order to insure the continuity of dividend payments and to provide for unforeseen risks, and that the guaranty by the New York Central of fixed dividends substantially eliminates the element of risk as to future dividend payments. In determining whether the rentals were reasonable, the Commission was obliged to consider not only stockholders' rights but the public interest in rates and continued service. The fairness of the rentals must also be considered in the light of the period for which the lease was to run. The lessee in committing itself to payment over a 99-year period is exposed to the risks of fluctuating income and possibly changing traffic conditions. The former risk is well evidenced by present economic conditions, the effect of which in relation to the transportation business

were judicially noticed by the Court in *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U. S. 248.

Appellant asserts, however, that in view of the New York Central's control of the lessor roads, the test of the adequacy of the rentals should be whether the maximum rental dividend available from any source was provided for in the lease. Testimony of officials, acting in the matter, who stated that they had made no attempt to obtain outside bids on the lease, is relied upon. (R. 218–222.) Even assuming that the claim of breach of fiduciary duty can be raised in this proceeding (*Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U. S. 479, 488), it would seem that the Commission's finding that the considerations, terms, and conditions were just and reasonable, when supported by the foregoing evidence, would be conclusive. The Commission has shown careful regard for minority rights in acquisitions where carriers have acted in a dual capacity. *Nickel Plate Unification,* 105 I. C. C. 425. The securing of outside bids was not necessary to establish good faith when it is apparent that by reason of its stock ownership the New York Central would not consent to the leasing of these lines to outside interests. Nothing in *Cleveland, C. C. & St. Louis Ry.* v. *United States,* 22 F. (2d) 509 (C. C. A. 6th), supports appellant's contention in this respect. In that case a stockholder of the Big Four sought to enjoin the New York

Central from voting stock which it held in the Big Four in favor of the execution of the present lease. The court reversed a decree below, granting an injunction, upon the ground that the lease had not yet been approved by the Commission, and stated that the Commission, before approval, was required to find that the considerations, terms, and conditions were just both to the lessor and to the lessee, and to the stockholders of each.

It is submitted that the Commission's finding was amply supported by evidence. The fairness of the leases is demonstrated by the alternate provision providing for the purchase by the lessee, at prices fixed by arbitration, of the shares of the minority interests.

2. The Commission's finding of public interest is sufficiently supported by the evidence

The advantages expected to result from the acquisitions have been above outlined. (*Supra,* p. 5.) The question whether the consummation of the leases would be in the public interest is essentially an administrative one. In addition to the close interrelation of the roads, which seemed to justify further unification, definite benefits were expected to accrue from the acquisitions. Revision of routes could be made due to the elimination of any objection to short hauling the lessor lines and alternate routes could be established. (R. 48.) Traffic could be routed over the most economical

routes through interchangeable rates (the unit obtaining the traffic to be credited irrespective of the route used), although no routes desired by shippers were to be closed. New routes were to be developed, expected to result in an aggregate saving of 11,796,789 car-miles through direct routing, eliminating approximately $1,000,000 in annual transportation expense. (R. 49.) Unified operation would also reduce yard movements and terminal switching and permit the routing of freight away from congested terminals. Transportation benefits were summarized as savings in car-miles affecting time in transit and deliveries; a better car supply, through expeditious movement of traffic; and substantial economies in operating costs through more effectual train grouping, reduced yard operations, and elimination of duplicated effort at common terminal points. Economies would be effected by the adoption of a unified accounting system in place of the detailed accounting now required for each company. (R. 50.) Major advantages would result in relation to the repair of equipment. Repair-shop extensions contemplated by the New York Central and Michigan Central, estimated to cost $7,000,000, could be indefinitely deferred through use of Big Four facilities (R. 50), and minor economies could be effected through the closing or combination of smaller shops.

It is submitted that, upon this showing, the lower court properly held that the Commission's finding of public benefit was sufficiently supported by the evidence.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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Solicitor General.

JOHN LORD O'BRIAN,
The Assistant to the Attorney General.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

OCTOBER, 1932.

I

APPENDIX

The Interstate Commerce Act, as amended, provides, in part:

> SEC. 5. (2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises. (c. 91, 41 Stat. 481, U. S. C., Title 49, Sec. 5 (2).)
>
> (4) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and com-

merce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties. (c. 91, 41 Stat. 481, U. S. C., Title 49, Sec. 5 (4).)

(5) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. The consolidations herein provided for shall be in harmony with such plan. (c. 91, 41 Stat. 481, U. S. C., Title 49, Sec. 5 (5).)

(6) It shall be lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation * * *. (c. 91, 41 Stat. 481, U. S. C. Title 49, Sec. 5(6).)

(8) The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section. (c. 91, 41 Stat. 482, U. S. C. Title 49, Sec. 5(8).)

SEC. 20a. (1) That as used in this section the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act. (c. 91, 41 Stat. 494, U. S. C. Title 49, Sec. 20a (1).)

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to

the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose. (c. 91, 41 Stat. 494, U. S. C. Title 49, Sec. 20a (2).)

(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2). (c. 91, 41 Stat. 495, U. S. C. Title 49, Sec. 20a(3).)

(4) Every application for authority shall be made in such form and contain such mat-

ters as the Commission may prescribe. Every such application, as also every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier. (c. 91, 41 Stat. 495, U. S. C. Title 49, Sec. 20a (4).)

(6) Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceeding. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority. (c. 91, 41 Stat. 495, U. S. C. Title 49, Sec. 20a(6).)

(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein. (c. 91, 41 Stat. 495, U. S. C. Title 49, Sec. 20a(7).)

(8) Nothing herein shall be construed to imply any guaranty or obligation as to such securities on the part of the United States.

(c. 91, 41 Stat. 495, U. S. C. Title 49, Sec. 20a(8).)

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. * * * (c. 91, 41 Stat. 496, U. S. C. Title 49, Sec. 20a(11).)

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FILE COPY

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1932

No. 5

THE NEW YORK CENTRAL SECURITIES CORPORATION,

Appellant,

against

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE MICHIGAN CENTRAL RAILROAD COMPANY,

Appellees.

BRIEF ON BEHALF OF THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, AND THE MICHIGAN CENTRAL RAILROAD COMPANY, APPELLEES

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Appellees.

BRIEF ON BEHALF OF ABOVE NAMED RAILROAD COMPANIES, APPELLEES

Preliminary Statement

In the brief for the United States and the Interstate Commerce Commission, concurrently filed, is contained a statement of the case, which, for that reason, is not repeated here. With respect to argument, it is the purpose of this brief to avoid repetition of the Government's brief

and merely to supplement the answers there made to the appellant's contentions. The opinion of the District Court is reported in 54 Fed. (2d) 122.

POINT I

The Commission's approval and authorization of the leases were within its statutory jurisdiction.

In its first point, the appellant contends that, because the New York Central had previously acquired majority ownership of the capital stock of the lessor companies, the Commission was powerless to authorize the leases. The appellant's theory is that the statute authorizes acquisition of control by stock ownership or by lease and that, therefore, the existence of some measure of control by stock ownership negatives the power of the Commission to authorize expansion of control by lease.

One obvious purpose of the Transportation Act was to authorize, with the approval of the Commission, railroad consolidations. In recognition of the circumstance that the promulgation of a comprehensive consolidation plan might take years in accomplishment, the legislation was framed so that progress in control might be made in the interim. The only limitation prescribed in the statute with respect to acquisitions prior to the adoption of a nation-wide consolidation plan was that they should not involve "the consolidation of such carriers into a single system for ownership and operation". [Interstate Commerce Act, Section 5 (2).] Specifically, acquisitions of control under lease or by purchase of stock, short of consolidation into one

corporation for ownership and operation, are authorized in the statute. Manifestly, there are varying degrees of control short of complete consolidation "into a single system for ownership and operation". It is repugnant to the specific provision of the statute and inconsistent with its whole plan to say, as the appellant does, that in all cases where some measure of control existed at the time of the passage of the Transportation Act, regardless of the degree or efficiency of such control, the existing status became "frozen" and static pending the adoption of the nation-wide consolidation plan.

POINT II

The leases do not create a consolidation into a single system for ownership and operation.

Even if the statute merely prohibited acquisitions of control "into a single system for ownership and operation" otherwise than pursuant to the nation-wide consolidation plan, it would seem clear that neither the ownership by one railroad company of a majority of stock of another, nor the lease thereof, nor both, would be within the prohibition. Here, however, it is not necessary to rely on that ground alone, because of the fact that the statute itself spells out types of acquisition of control that are not intended to be included within the expression "a single system for ownership and operation". Ownership of stock and lease are both named in the Act as methods of acquisition of control that are not only to be deemed free of the limitation but as types of control that are specifically authorized. The obvious intention of the law to sanction any or all forms

of control approved by the Commission, short of consolidation "into a single system for ownership and operation", is emphasized by the additional language of the statute, which authorizes not only acquisitions of control by stock ownership or under lease but, as well, "in any other manner not involving the consolidation of such carriers into a single system for ownership and operation".

If further evidence of the untenable nature of the appellant's contention were needed, it is to be found in the language of Section 5 (6), of the Interstate Commerce Act, which deals with consolidations pursuant to the plan to be promulgated by the Commission. It is there provided that it shall be lawful for two or more carriers "to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties". The nature and extent of the control which is disallowed in Section 5 (2) is thus redefined in Section 5 (6). The conclusion is clear that acquisitions of control may be authorized under Section 5 (2) so long as such acquisitions do not result in the consolidation of two or more carriers into a single system for ownership and operation, or, stated differently, into one corporation for ownership, management and operation.

POINT III

The Commission, in authorizing the acquisition of control by the leases here involved, acted within its lawfully delegated powers.

In Point III of its brief, the appellant urges that the lines of the lessor and lessee companies are parallel and

competing, and that, therefore, the Commission was without power to authorize the leases.

Aside from the fact that there is no evidence in the case to support the appellant's allegations that the lines of the lessor and lessee companies are parallel and competing, and although the record shows that the lines are primarily and substantially complementary to each other, the contention fails for the reason that Section 5 (8) of the Act specifically relieves carriers from the operation of the anti-trust laws and "of all other restraints and prohibitions by law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by any order" made under preceding provisions of the Section. The appellant endeavors to demonstrate what it conceives to be an inconsistency between the provision for preservation of competition, contained in Section 5 (4), and the provision for relief from anti-trust laws, referred to in Section 5 (8). The preservation of competition referred to in Section 5 (4) manifestly relates to competition between the limited number of systems there contemplated and not to the preservation of competition between properties which the Commission finds it to be in the public interest to allocate to a particular system. Unless the law is so construed, the provision for establishment of a limited number of railroad systems becomes obviously impracticable of accomplishment.

After thus misconstruing paragraphs (4) and (8) of Section 5, the appellant urges that, by conferring upon the Commission the power contained in Section 5 (2) to authorize acquisitions of control "in the public interest", there is an unconstitutional attempt to delegate legislative power through failure to lay down a sufficiently definite standard

for the Commission's guidance. The purposes of the Act as declared therein have been judicially recognized by this Court.* The words "public interest", as used in the statute, when read in the light of their context and in the light of the purposes to be accomplished as thus declared and judicially recognized, are as definite as circumstances permit. As stated by Mr. Justice Holmes in *Avent* v. *United States*, 266 U. S. 127, 130, regarding statutory provisions conferring upon the Commission power with reference to car service rules, "the requirement that the rule shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed".

The requirement that the Commission shall exercise its power "in the public interest" stands upon a footing closely analogous to that of Section 1 (18), which prescribes that extensions and abandonments of lines shall be authorized when required or permitted by "public convenience and necessity", which this Court has upheld.

Chesapeake & Ohio R. R. Co. v. *United States*, 283 U. S. 35;
Texas & Pacific Ry. Co. v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266;
Colorado v. *United States*, 271 U. S. 153.

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* In *New England Divisions Case*, 261 U. S. 184, 189, the Court said:

"The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. [Marginal note: Thus: to enable the carriers 'properly to meet the transportation needs of the public,' §422, p. 491; to give due consideration to 'the transportation needs of the country, * * * and the necessity * * * of enlarging [transportation] facilities,' §422, p. 488; to 'best meet the emergency and serve the public interest,' §402, p. 477; to 'best promote the service in the interest of the public and the commerce of the people,' §402, pp. 476, 477; 'that the public interest will be promoted,' §407, p. 482.]"

See also *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331; and *Colorado* v. *United States*, 271 U. S. 153.

POINT IV

The leases are within the corporate powers of the lessor and lessee companies.

In Point IV of the appellant's brief, it is argued that the leases approved and authorized by order of the Commission are *ultra vires* of the lessor and lessee companies by reason of failure to comply with the statute of Ohio that prescribes a rental basis in the case of railroad leases.

There is a two-fold answer to this contention:

1. The law of Ohio empowers railroad corporations to lease their railroads, franchises and properties, and Section 5 (8) of the Interstate Commerce Act relieves interstate carriers from all "restraints or prohibitions by law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the" preceding provisions of Section 5. In the exercise of its paramount power to regulate interstate commerce, the Congress has enacted that interstate carriers shall be relieved from the limitations and obstructions of state laws in doing anything authorized or required by the Commission pursuant to provisions of Section 5.

A simple and not improbable illustration will demonstrate the unsoundness of the appellant's contention that Section 8807 of the Ohio General Code, which authorizes leases may not be invoked free of the rental limitation prescribed in Section 8809 of that Code. Let it be assumed that in the State of Indiana (in which the Big Four and the New York Central also are incorporated) there existed a stat-

ute which provided that in the event of a railroad lease the rental may not be as much as the net earnings of the leased railroad for the preceding fiscal year. In this connection, it is not improper to observe that public interest might reasonably justify such a restriction so as to limit the fixed charges of the operating carrier. There would thus exist two irreconcilable limitations. In such a contingency, unless Section 5 (8) is accepted at its face value and relief accorded from "restraints or prohibitions by law, State or Federal", it is obvious that the purpose of Congress would be frustrated, notwithstanding its definite and specifically expressed purpose to surmount such obstacles.

This Court has held that the Federal Government, in its field of constitutional activity, may avail itself of State instrumentalities without recognition of the restrictions thereon imposed by state law (*Federal Land Bank* v. *Crosland,* 261 U. S. 374). Closely analogous is the principle applied in *United States* v. *Chicago, Milwaukee & St. Paul R. Co.,* 282 U. S. 311, 328, where the Court said:

> "It has long been settled in this Court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possess the unqualified power to withhold the grant altogether, does not annul the grant. The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant."

2. Although, as just argued, it is not necessary to establish that Section 5 directly confers corporate power to lease, the fact remains that it definitely does so. By Section 5 (2) the Commission is empowered not only to approve leases, when in the public interest, but also to authorize (*i. e.,* to make lawful) the same. Clearly, the in-

clusion in the law of the power not only to "approve" but, as well, to "authorize" is of vital significance. "To approve" is to sanction the propriety of an act, but "to authorize" is to clothe with power, that is, to *enable* the performance of the act.*

Furthermore, the appellant's contention regarding the provisions of the Ohio statute would require Section 5 (2) to be treated as if amended to restrict the Commission's authority to authorization of acquisitions "under such rules and regulations and for such consideration as may be fixed by the laws of the several states [*e.g.*, Ohio] in which the carriers involved are incorporated, and on such terms and conditions as may be prescribed by the laws of such states", or in some manner of similar purport. That Congress did not intend that state laws should govern the consideration, terms and conditions is clear from the words of Section 5 (2) that acquisitions shall be approved and authorized "under such rules and regulations and for such considerations and on such terms and conditions *as shall be found by the Commission* to be just and reasonable in the premises" (Italics ours). These provisions, together with the provisions of Section 5 (8), place the unsoundness of the appellant's contention in a strong light.

In this connection, the case of *People* v. *Illinois Central R. Co.*, 324 Ill. 591 (cert. denied 275 U. S. 541), is apposite.

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* Webster's International Dictionary defines "authorize" thus: "to clothe with authority, warrant or legal power; to give a right to act; to empower", and defines "approve" to mean: "to sanction officially, to ratify, to confirm".

In *Blair* v. *Chicago*, 201 U. S. 400, 457, it is said:

> "The company must be 'authorized' by the city council before it can lay tracks or operate railways in the streets. This is more than to designate that for which authority has already been given. To authorize is to 'clothe with authority,' Webster's Dict.; 'To give legal power to,' Century Dict. It is an additional grant of right and power which the legislature requires the corporation to obtain as a condition precedent to its use and occupation of the streets."

There the Illinois authorities and certain stockholders of the Illinois Central sought to enjoin the Illinois Central from acquiring control by lease and stock ownership of another carrier, the contention being that the carrying out of the proposals, which had been authorized by the Interstate Commerce Commission, was beyond the charter power of the carriers. The Court denied the injunction, saying (pp. 608-9):

> "The exclusive jurisdiction of Congress and of its agency, the Interstate Commerce Commission, to regulate interstate commerce and the instrumentalities of such commerce, has been recognized by this court in *Marion and Eastern Railroad Co.* v. *Missouri Pacific Railroad Co.*, 318 Ill. 436. In the exercise of this regulatory power Congress may grant to a railroad corporation created by a State, franchises additional to those enjoyed under its charter. *Central Pacific Railroad Co.* v. *California*, 162 U. S. 91; *Southern Pacific Railroad Co.* v. *United States*, 183 id. 519; *California* v. *Central Pacific Railroad Co.*, 127 id. 1.
>
> "The record shows that the Southern Illinois and Kentucky Railroad Company will be an interstate carrier. Upon the application of the appellees, which was resisted by the appellants, the Interstate Commerce Commission found, among other things, that the public convenience and necessity required the construction of the cut-off between Edgewood, Illinois, and Fulton, Kentucky, and the acquisition and operation by the Illinois Central Railroad Company of the railroad to be built by the Southern Illinois and Kentucky Railroad Company; and the commission by its order granted the requisite permission and authority for these purposes. *The appellees, by the provisions of the Interstate Commerce act, have the right to do these things without seeking any further authority.* If, as the result of the instant suit,

the construction of the cut-off should be enjoined, then a conflict of jurisdiction between the commission and the State court would necessarily arise, for what was affirmed by one would be denied by the other. In such a situation the power to determine whether State action will obstruct interstate commerce inheres in the United States as an incident of its power to regulate such commerce. *State of Colorado* v. *United States,* No. 195, decided by the Supreme Court of the United States on May 3, 1926; *Alabama and Vicksburg Railway Co.* v. *Jackson and Eastern Railway Co., supra.*" (Italics ours.)

POINT V

The appellant's contention that a lease of the Michigan Central Railroad requires approval of seventy-five per cent of the holders of an outstanding bond issue is not sustained by the text of the underlying indenture, may not be urged by the appellant because of lack of interest, and, in any event, is not cognizable in this suit.

The debenture bonds issued under the trust indenture in question (I. C. C. Docket 5690, Exhibit 47) were secured by the deposit of shares of capital stock of the Michigan Central, and the prohibition in Section 5 of Article III of the trust indenture from which the appellant on page 49 of its brief makes an incomplete quotation (Finance Docket No. 5690, Exhibit 47, pp. 22-24), was against a consolidation, merger or sale whereby title to the Michigan Central property represented by the capital stock should be transferred to the New York Central or whereby the property of any other railroad corporation should be acquired by the Michigan Central by consolidation, merger or purchase,

except with the approval of the required percentage of bondholders. A lease was neither within the prohibition of the Section nor within the intent of the prohibition. The word "lease" is to be found only in the last paragraph of Article III wherein provision is made for the execution and delivery of a second mortgage. Such mortgage was executed and delivered some time prior to the making of the lease.

But it is not necessary in this case to undertake an analysis of the provisions of the indenture. Under well settled principles, the appellant, which does not claim that it owns any of the bonds in question, has no standing to assert that the rights of bondholders are being disregarded. It is sufficient to point out that neither the trustee of the indenture, nor any holder of such bonds, is here asserting a violation of the terms of said indenture.

Furthermore, since the indenture is an agreement of the New York Central (the Michigan Central not being a party thereto) it is clear that the appellant's alleged interest is exclusively of a derivative character predicated upon its ownership of stock in the New York Central. Such a claim may not properly be asserted in a suit to annul an order of the Commission under the Urgent Deficiencies Act (*Pittsburgh & W. Va. Ry. Co.* v. *United States,* 281 U. S. 479).

POINT VI

(a) The proofs adduced before the Commission abundantly establish the reasonableness of the dividend rentals prescribed in the leases; (b) in any event, no question with respect thereto is here presented, since the appellant has neither pleaded nor proved that the order approving the terms of the leases was unsupported by substantial evidence.

(a) In view of the analyses of the voluminous evidence before the Commission in support of the reasonableness of the rental provisions under the leases, contained in the Commission's report (Transcript of Record, pp. 41-47, 74-82), in the opinion of the Court below (Transcript of Record, pp. 192-195) and in the brief of the Government (pp. 37-43), it would constitute a work of supererogation here to re-abstract and re-analyze that evidence. That the evidence was of a most comprehensive nature is indicated by a recital of the manifold aspects of the question that were submitted to and considered by the Commission. There were received in evidence before the Commission income accounts of the lessor companies for a considerable number of years (Finance Docket 5690, Exhibit 35), tables containing the vital statistics of the lessor companies for all years going back as far as the year 1909 (*id.*, Exhibits 36, 37, 38), comparisons of earnings with average market prices of a number of the principal railroads of the country (*id.*, pp. 314-324), statements showing the amount and disposition of net earnings as well as amounts of outstanding stock and dividend payments of ten principal roads in the United States as compared with the Michigan Central and Big Four (*id.*, pp. 496, 497), and a detailed consideration by

qualified witnesses of all elements germane to the fixing of a long-term rental (*id.*, p. 312 *et seq.*, 459 *et seq.*).

The appellant in its brief urges as an indication of the inadequacy of the rentals and of a breach of duty toward minority stockholders the circumstance that no effort was made by the respective lessors' directors to ascertain whether more favorable terms than those proposed by the New York Central might not be obtained from others. For over forty years the Big Four, Michigan Central and New York Central had been operated as a part of the same system in the public interest. Under these circumstances, any such inquiry would have been a mere gesture. The idleness of such an inquiry the appellant itself made clear before the Commission. In an effort to emphasize this point, the following question was put to Mr. Clarence H. Venner, President of the appellant corporation, by his Counsel:

> "Do you know of any one who, if afforded opportunity, would take a lease on the terms of this proposed lease of the Michigan Central but at a higher rental?"

The reply was:

> "Yes; a much higher rental" (p. 661).

Questioning by the Director of the Bureau of Finance of the Commission, who was presiding at the hearing, elicited the fact that the "some one" was Mr. Venner and his "associates" (p. 666), whom he declined to name (p. 669) and whom he had not even consulted (p. 670).

It is noteworthy that Mr. Commissioner Eastman, the only Commissioner voicing any criticism of the rentals, was of the opinion that they were too high (Transcript of Record, p. 86).

In view of the preponderance of evidence upon the basis of which the Commission held that the specified rentals are just and reasonable, it would not seem necessary to consider the appellant's contentions respecting the trust relationship as between majority and minority stockholders. The yard-stick prescribed by law with respect to the terms and conditions of acquisitions of control is that they shall be such as "shall be found by the Commission to be just and reasonable in the premises". All persons, including stockholders, entering into contractual or other relationships with carriers engaged in interstate commerce do so subject to the power of Congress to modify those relationships by the enactment of laws pursuant to the commerce clause of the Constitution.

Louisville & Nashville R. Co. v. *Mottley,* 219 U. S. 467;
Philadelphia, etc., R. Co. v. *Schubert,* 224 U. S. 603, 613;
United States v. *Southern Pacific Co.,* 259 U. S. 214, 234;
Colorado v. *United States,* 271 U. S. 153, 165.

In connection with the question of the fairness of the rentals fixed by the terms of the leases, it is also appropriate to consider the alternative right accorded stockholders to sell their stock to the lessee at prices to be determined by arbitration, with the understanding that, in such valuation, effect of the leases is to be considered or disregarded at the option of the stockholder. That provision in itself indicates a scrupulous regard for the interests of minority stockholders of the lessor companies.

Reduced to its essential features, the situation is that the leases accorded the appellant the right to a return on

its shares of stock, guaranteed for the terms of the leases and fixed at sums found to be just and reasonable by the administrative tribunal empowered by law to determine the same; and if not content with this, in the alternative, the right to compel the lessee to purchase its stock at a price to be fixed by arbitrators chosen in a manner universally conceded to be fair and proper. These provisions meet every rational test of fairness.

(b) The appellant's argument with respect to alleged inadequacy of the rentals is properly one which may be addressed only to the fact-finding tribunal authorized by law to determine that question. The appellant intervened in the proceedings before the Commission and there urged precisely the contentions that are here urged. This position of the appellant altogether ignores the function of judicial review of the Commission's orders, when within the scope of its jurisdiction, as repeatedly announced by this Court.

Western Paper Makers' Chemical Co. v. *United States,* 271 U. S. 268, and cases there cited;

Florida East Coast Line v. *United States,* 234 U. S. 167;

Interstate Commerce Commission v. *Union Pacific R. R. Co.,* 222 U. S. 541;

Manufacturers Ry. Co. v. *United States,* 246 U. S. 457;

Chicago, Rock Island & Pacific Ry. v. *United States,* 274 U. S. 29;

Virginian Ry. Co. v. *United States,* 272 U. S. 658.

POINT VII

The condition in the Commission's order relating to the acquisition of connecting short lines, having been accepted by the New York Central, may not be challenged in this suit by the appellant.

The only concern of the appellant in this condition of the order is in its capacity as a holder of sixty-six shares of the capital stock of the New York Central. Its interest is, therefore, exclusively derivative and as shown in the Government's brief (p. 33 *et seq.*) gives the appellant no standing in this suit to challenge the action of his corporation in accepting the condition so imposed. *A fortiori,* the appellant may not challenge in this suit the validity of the Commission's order entered upon the acceptance by the Central of the condition so imposed. (*Pittsburgh & West Virginia Railway Co.* v. *United States,* 281 U. S. 479.)

POINT VIII

The assumption by the New York Central of obligation with respect to lessor company securities was within the Commission's power to approve under Section 20a of the Interstate Commerce Act.

At the threshold it should be noted that the appellant has no standing to challenge the Commission's order approving the New York Central's assumption of obligation with respect to securities of the lessors because, here again, the appellant's concern is solely derivative. (*Pittsburgh & West Virginia Ry.* v. *United States,* 281 U. S. 479.)

Viewing the merits of the appellant's contention, that the Commission was powerless to approve the assumption of obligation by the New York Central, for the reason that such assumption is not for a lawful object within its corporate purposes, it is evident that this is corollary to its contention that the leases are *ultra vires*. Since it has been demonstrated above that the leases are not *ultra vires*, the appellant's contention in regard to the assumption of obligation and liability must fail upon that ground alone.

But the contention must fail for another reason also, namely, that the Commission's jurisdiction in proceedings under Section 20a is not measured by state law, but is exclusive and plenary under Section 20a (7).

The appellant contends that the requirements of the Section that the Commission find that the proposed issue or assumption is for some "lawful object" within the carrier's "corporate purposes" has reference to state law and the carrier's corporate powers thereunder. It is at once evident that such a construction of the language would destroy the recognized purposes of the Section. Under such an interpretation the control of the issue of securities by carriers and the assumption of obligation or liability in respect thereof would remain in control of, and carriers in these matters would remain subject to, the local and conflicting policies of the various states. Thus, the "exclusive jurisdiction conferred upon the Commission by Section 20a over the issuance of securities" (*Colorado* v. *United States*, 271 U. S. 531) would be only such jurisdiction as the Interstate Commerce Commission could exercise pursuant to the authority of and not inconsistent with provisions of varying state laws. That Congress could have intended this result is unthinkable.

Reference to the legislative history of the provisions is appropriate (*Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443) to demonstrate the unsoundness of the appellant's contention. The relevant history of Section 20a (2) is summarized in the opinion below (Transcript of Record, pp. 198, 199) and in the brief of the Government (pp. 27-28).

Conclusion

It is respectfully submitted that the decree below should be affirmed.

Dated, October 1, 1932.

CHARLES C. PAULDING,
JACOB ARONSON,
Solicitors for the Railroad Companies, Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 5.—October Term, 1932.

The New York Central Securities Corporation, Appellant, *vs.* The United States of America, The Interstate Commerce Commission, The New York Central Railroad Company, et al.	Appeal from the District Court of the United States for the Southern District of New York.

[November 7, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

On July 2, 1929, the Interstate Commerce Commission made an order authorizing the New York Central Railroad Company to acquire control, by lease, of the railroad systems of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (known as the 'Big Four') and of the Michigan Central Railroad Company. By order of December 2, 1929, the Commission permitted the assumption by the lessee of obligation and liability in respect of certain securities of the lessors. In this suit, a minority stockholder of each of the lessors, and of the lessee, sought to set aside these orders upon the ground that the Commission had exceeded its authority. The District Court, of three judges, upon pleadings and proofs, and having filed findings of fact and conclusions of law, denied the motion for injunction and dismissed the petition upon the merits. 54 F. (2d) 122. The petitioner appeals. U. S. C., Tit. 28, secs. 47, 345.

The District Court, against objection, sustained its jurisdiction. The court took the view that the petitioner, as a minority stockholder of the lessors, alleged an injury not merely derivative, but independent, being a member of a class created by the leasing agreements. 54 F. (2d) at p. 126; compare *Pittsburgh & West Virginia Railway Co.* v. *United States,* 281 U. S. 479, 487. While appellees submit that there are certain contentions which appellant may not properly raise, the correctness of the decision as to jurisdiction is conceded.

The authority of the Commission to make the orders is rested upon section 5, subdivision 2, and section 20a of the Interstate

Commerce Act. U. S. C., Tit. 49.[1] After full hearing, and upon consideration of the purpose of the proposals, of the physical, traffic and intercorporate relationships, of investment, income and dividends, of the provisions of the proposed leases, of the benefits deemed to accrue to the public, of the particular situation of certain short lines, and of the objections raised by minority stockholders, the Commission found that the "considerations and terms and conditions" set forth in the proposed leases were "just and reasonable" and that the contemplated acquisition would be "in the public interest". The authorization was upon the express condition that before the leases became effective, the New York Central should offer to acquire specified short lines upon terms and conditions stated. Report, January 14, 1929, 150 I. C. C. 278, 321, 322. Upon proof of compliance with this condition, and upon further conditions, the acquisition was approved. Supplemental Report and Order of July 2, 1929, 154 I. C. C. 489, 494, 495. One of the conditions was that the New York Central and the 'Big Four' should not be relieved from compliance with

[1]The pertinent provisions of these sections are as follows:

"Sec. 5 (2): *Acquisition of control of one carrier by another.*—Whenever the commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this chapter, that the acquisition, to the extent indicated by the commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the commission to be just and reasonable in the premises. . . ."

"Sec. 5 (8): *Carriers affected relieved from operation of antitrust laws, etc.*—The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order are relieved from the operation of the 'antitrust laws', as designated in section 12 of Title 15, Commerce and Trade, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section. . . ."

"Sec. 20a (2): *Issuance of securities; assumption of obligations; authorization.*—It shall be unlawful for any carrier to issue any share of capital stock

provisions of law applicable to any assumption of obligations and liabilities by virtue of the execution of the leases. On later application for authority in that respect, the Commission found that the proposed assumption by the carriers was "for a lawful object within their corporate purposes, and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by them of service to the public as common carriers, and which will not impair their ability to perform that service" and was "reasonably necessary and appropriate for such purpose". Report and Order of December 2, 1929, 158 I. C. C. 317, 323, 328.

Appellant contends (a) that as the New York Central had already acquired control of the 'Big Four' and Michigan Central by stock ownership, the Commission could not authorize acquisition of control by lease; (b) that the proposed acquisition involved a "consolidation" which could not be authorized under section 5 (2); (c) that the main lines of the lessors are parallel and competing with those of the lessee so that competition would be suppressed, and that the attempt to confer authority upon the Commission to approve the acquisition of control was an unconstitutional delegation of power; (d) that the proposed leases transgressed limitations imposed by state authority; and (e) that the action of the Commission was unsupported by evidence and was arbitrary and confiscatory as to the appellant. The questions presented thus relate, in part, to the construction and validity of

or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose. . . ."

the statute and, in part, to the present application of the statute in view of the particular terms of the leases.

First. The Commission stated that, while the properties of the New York Central, the 'Big Four' and the Michigan Central are operated as separate units, the companies are under common control. This control has existed for many years. The Commission found that the New York Central held upwards of 99 per cent. of the stock of the Michigan Central and upwards of 91 per cent. and 84 per cent., respectively, of the common and preferred stocks of the 'Big Four'. The authority to lease was sought in the view that it would facilitate revision of routes, and physical improvements needed for new routes, and would make possible important economies in operation which the Commission set forth in detail. Section 5 (2) authorizes the acquisition of control "to the extent indicated by the Commission." The question is not of the extent of the control, provided it stops short of "consolidation", but of the public interest in having the control maintained. The public interest is served by economy and efficiency in operation. If the expected advantages are inadequately secured by stock ownership and would be better secured by lease, the statute affords no basis for the contention that the latter may not be authorized although the former exists. The fact that one precedes the other cannot be regarded as determinative if the desired coordination is not otherwise obtainable. The disjunctive phrasing of the statute "either under a lease or by the purchase of stock" must be read in the light of its obvious purpose and cannot be taken to mean that one method must be exclusive of the other.

The statute refers to "control" in contradistinction to "consolidation". Subdivision (2) itself indicates that control by purchase of stock or by lease is not regarded as a "consolidation" as the word is there used. Its use is in the restricted sense of the formation of a "single system for ownership" as well as for "operation". This distinction between control where separate ownership continues, and consolidation where a single ownership is created, is a familiar one in the law. *Railroad Company* v. *Georgia*, 98 U. S. 359, 363. That the Congress had this distinction in view appears from the other provisions of section 5. Thus, subdivision (6) permits carriers "to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate

ownership, management, and operation". This may be effected under stated conditions which contemplate the ownership by one corporation of the consolidated properties and the issue of securities upon that basis. The view that the proposed acquisition does not involve a "consolidation" contrary to the limitation in subdivision (2) is in accord with the long-continued construction of the statute by the Interstate Commerce Commission. *Control of El Paso & S. W. System*, 90 I. C. C. 732; *Control of Alabama & Vicksburg, etc.*, 111 I. C. C. 161, 169; *Lease of Pan Handle*, 72 I. C. C. 128, 133; *New York Central Leases*, 72 I. C. C. 243; *Control of Central Pacific*, 76 I. C. C. 508; *Nickel Plate Unification*, 105 I. C. C. 425. And this administrative construction would be persuasive if the statute could be regarded as ambiguous. *United States* v. *Jackson*, 280 U. S. 183, 193; *Louisville & Nashville R. R. Co.* v. *United States*, 282 U. S. 740, 757. Whether the particular authorization, in the light of the situation of these carriers, would interfere with plans of the Commission for consolidation was an administrative question with which the Commission was competent to deal.

Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the "public interest". It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court, in *New England Divisions Case*, 261 U. S. 184, 189, 190, adverted to that purpose, which was found to be expressed in unequivocal language; "to attain it, new rights, new obligations, new machinery, were created". The Court directed attention to various provisions having this effect, and to the criteria which the statute had established in referring to "the transportation needs of the public", "the necessity of enlarging transportation facilities", and the measures which would "best promote the service in the interest of the public and the commerce of the people". *Id.* p. 189, *note*. See, also, *Texas & Pacific Rwy. Co.* v. *Gulf, Colorado*

& Santa Fe Rwy. Co., 270 U. S. 266, 277. The provisions now before us were among the additions made by Transportation Act, 1920, and the term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and to the issue of certificates of public convenience and necessity. *Intermountain Rate Cases*, 234 U. S. 476, 486; *Railroad Commission* v. *Southern Pacific Company*, 264 U. S. 331, 343, 344; *Avent* v. *United States*, 266 U. S. 127, 130; *Colorado* v. *United States*, 271 U. S. 153, 163; *Chesapeake & Ohio Rwy. Co.* v. *United States*, 283 U. S. 35, 42.

The fact that the carriers' lines are parallel and competing cannot be deemed to affect the validity of the authority conferred upon the Commission. The Congress, which had power to impose prohibitions in the regulation of interstate commerce (*Northern Securities Company* v. *United States*, 193 U. S. 197), had equal power to foster that commerce by removing prohibitions and by permitting acquisition of control where that was found to be an aid in the accomplishment of the purposes in view in the enactment of Transportation Act, 1920. See *New York* v. *United States*, 257 U. S. 591, 601; *Colorado* v. *United States*, 271 U. S. 153, 165. Exercising this paramount power, the Congress expresslly provided in subdivision (8) of section 5, which has direct reference to subdivision (2), that "the carriers affected by any order made under the foregoing provisions of this section" are "relieved from the operation of the 'antitrust laws' ", and "of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section". The question whether the acquisition of control in the case of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case.

Appellant contends that the provision of subdivision (8) of section 5, referring to "restraints or prohibitions by law, State or Federal" should be construed as limited to those restrictions which are of the same general character as the 'antitrust laws' and not as applying to specific limitations imposed by state laws upon corporate powers with respect to the making of leases. Appellant invokes the laws of the States of incorporation in relation to leases of competing lines, and especially the laws of Ohio upon that subject and with respect to minimum rentals and security for payment and the preservation of property. It is sufficient for the present purpose to say that this contention cannot, in any event, avail the appellant. The question of the right of a State of incorporation, in a direct proceeding, to challenge the leases as *ultra vires* is not before us. See *Cleveland, Cincinnati, Chicago & St. Louis Rwy. Co.* v. *United States*, 275 U. S. 404, 414. The order of the Commission under section 5 (2) is permissive, not mandatory. There is no warrant for concluding that the Congress intended to fetter the exercise of the Commission's authority by requiring that the Commission before making its order must determine whether the acquisition is within the corporate powers of the carrier under state laws. The Commission has given its approval in the exercise of the authority conferred and the question of corporate powers cannot properly be raised in this suit to set aside the Commission's order. *Cleveland, Cincinnati, Chicago & St. Louis Rwy. Co., supra; Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, 391.

Nor is there ground for a different conclusion with respect to the Commission's order under section 20a, authorizing the assumption of obligations. Appellant points to the requirement in that section that the Commission shall make such an order only if it finds that the assumption by the carrier is "for some lawful object within its corporate purposes." But that this provision does not refer to state limitations upon corporate powers, but rather to the general field of corporate purposes, sufficiently appears from the context and from the legislative history of the clause. In creating federal supervision of the issue of securities by interstate carriers, the Congress, so far from making it necessary for the Commission to determine whether there had been compliance with state requirements, expressly provided in subdivision (7) of section 20a that the jurisdiction of the Commission

should be "exclusive and plenary" and that approval, other than as specified in that section, should not be necessary.[2]

Another objection, urged against the order under section 5 (2), is that the Commission had no power to make the acquisition of certain short lines a condition of its approval of the leases. The condition is asserted to be a burdensome one, opposed by the New York Central when it made its application and involving the building up of an enlarged system. But section 5 (2) expressly authorized the Commission to impose conditions, and its action in so doing was not limited to conditions proposed or favored by the carriers. The Commission stated the facts as to each of the short lines (150 I. C. C., pp. 294-311) and the Commission found that those lines to which the condition relates were complementary to the New York Central System and that their preservation was "required by public convenience and necessity and for the maintenance of an adequate transportation system". *Id.*, p. 322. It cannot be said that the consideration of the situation of these short lines was not appropriate to the determination which the Commission was called upon to make or that the condition was arbitrarily imposed.

Second. Questions as to the alleged breach by the New York Central, as majority stockholder of the Michigan Central, of its fiduciary duty to the appellant as minority stockholder, in the light of the terms of the indenture under which the voted shares had been pledged to secure bonds, are not properly raised in this

[2]It appears that in the course of the consideration of the measure which ultimately became section 20a (2) the words "corporate purposes" were substituted for "corporate powers". 54 F. (2d) at p. 130, *note*. It should also be noted that, in connection with the provision which became subdivision (7) of section 20a, an amendment was offered in the House of Representatives to strike out that paragraph and to provide that no security should be issued under the Act "except in the manner and form prescribed by the laws of the state which created such common carrier, and that this section is not to be construed as a limitation of state authority, but only as cumulative thereof". The amendment was defeated. Cong. Rec., 66th Cong., 1st sess., vol. 58, pp. 8673, 8676. Mr. Esch, in the report of the measure to the House of Representatives, stated: "Without federal control, the carriers would have to be subjected to the diversified requirements of the several states. . . . The enactment of the pending bill will put the control over stock and bond issues exclusively in the hands of the Federal Government and will result in uniformity and greater promptness of action." Cong. Rec., 1st sess., House Report No. 456, p. 21.

suit under the Urgent Deficiencies Act (U. S. C., Tit. 28, sec. 47) and hence are not open to review on this appeal. *Pittsburgh & West Virginia Railway Co.* v. *United States*, 281 U. S. 479, 488.

The remaining questions with respect to the adequacy of the rentals fixed, the other terms of the proposed leases, and the public interests involved, relate to the propriety of the action of the Commission in the exercise of its authority under the statute as construed. As to these matters the parties were fully heard, pertinent evidence was received and considered, and we find no basis for a contention that the order of the Commission was not adequately supported or had any confiscatory effect. *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 663; *Georgia Commission* v. *United States*, 283 U. S. 765, 775.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.